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IN THE

Supreme Court of the United States

October Term, 1963

No. 285

In the Matter of the Proceedings Pursuant to Section 9-a (amended to Section 22) of Article VI of the Constitution

In Relation To

LOUIS L. FRIEDMAN, Justice of the Supreme Court, Second Judicial District,

Appellant,

against

COURT ON THE JUDICIARY OF THE STATE OF NEW YORK, by JOHN R. DAVISON, Esq. and WILLIAM R. BRENNAN, Esq., Counsel Designated by Said Court to Conduct the Proceedings,

Appellee.

ON APPEAL FROM COURT ON THE JUDICIARY OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

October Term, 1963

No.

In the Matter of the Proceedings Pursuant to Section 9-a (amended to Section 22) of Article VI of the Constitution

In Relation To

Louis L. Friedman, Justice of the Supreme Court, Second Judicial District,

Appellant,

against

Court on the Judiciary of the State of New York, by John R. Davison, Esq. and William R. Brennan, Esq., Counsel Designated by Said Court to Conduct the Proceedings,

Appellee.

On Appeal From Court on the Judiciary of the State of New York

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JURISDICTIONAL STATEMENT

Louis L. Friedman, above named, appeals from a final order entered in the office of the Clerk of the Court on the Judiciary of the State of New York on February 22, 1963, which by a divided vote of four to two, removed appellant from his elected public office of Justice of the Supreme Court of the State of New York. The appeal is also taken from another order of said Court entered in said Clerk's office on April 3, 1963, which denied a motion made by appellant to vacate the order of removal. Appellant submits this statement to show that the Supreme Court

of the United States has jurisdiction, and that substantial and important federal constitutional questions are presented respecting federal due process.

A copy of the order of removal is Appendix A, hereto.

A copy of the order denying the motion to vacate the order of removal is Appendix B, hereto.

Opinions Below

The Court on the Judiciary filed no opinion in support of its order of removal, except in so far as formal conclusory findings are stated therein (Appendix A hereto). One previous report of the Court on Judiciary in a wholly unrelated matter was reported in a volume of the N. Y. 2d Reports, but the proceedings in the instant matter have not as yet been officially reported. A short decision was rendered by the Court on the Judiciary on the motion to vacate the removal order, and this, too, has not been officially reported. A copy of this decision is Appendix C, hereto.

An attempt to review the removal order and the order denying vacator in the Appellate Division of the Supreme Court of the State of New York, Third Department, both by way of appeal and by certiorari, was dismissed by that court on July 9, 1963, for the stated reason that said court had no power to review orders of the Court on the Judiciary. Opinion of Appellate Division is Appendix D, hereto (not yet officially reported).

Jurisdiction

The proceeding below was instituted by the Court on the Judiciary of the State of New York for the removal of appellant as a Justice of the Supreme Court, pursuant to section 9-a of Article VI of the Constitution of the State of

New York. The federal constitutional question was thus raised in appellant's answer (R., Vol. I, 6a):

> "Sixth: That the procedures for the removal for cause of a Supreme Court Justice pursuant to Article VI, Section 9-a of the Constitution of the State of New York contravene the due process clause of the Fourteenth Amendment of the Constitution of the United States inasmuch as it requires that the same body preferring the charges should hear and determine them."

Section 9-a of Article VI of the New York State Constitution, (hereinafter referred to only as section 9-a) was superseded by section 22 of said Article (hereinafter referred to only as section 22) on September 1, 1962. At the proceedings of December 10, 1962, (typewritten minutes thereof are annexed to inside front cover of R., Vol. I, immediately following copies of Notice of Appeal to this Court), the charges and the title of this proceeding were amended to refer to section 22 in place of section 9-a, and the answer, and particularly the above-quoted portion thereof, was similarly amended. At the same time, the answer was additionally amended to add the words "as to this respondent" after the word "contravene", in said above-quoted portion of said answer (see pp. 1 and 2 of said typewritten minutes).

The Court on the Judiciary of the State of New York has held section 9-a, (later amended to section 22) valid, and has dismissed the federal constitutional question raised with respect to it, by denying the motion to dismiss made by appellant on the grounds set forth in quoted paragraph "Sixth" of the answer (see proceedings of Dec. 10, 1962, annexed to R., Vol. I, pp. 2, 3, 4, 15, 18, 19, and R., Vol. IV, 1240a).

A notice of appeal from both the removal order dated February 22, 1963, and the order denying vacator dated April 3, 1963 and entered on April 18, 1963, was filed in

the office of the Clerk of the Court on the Judiciary on May 21, 1963.

The jurisdiction of this Court to review this case by direct appeal is invoked under 28 U. S. C. A., section 1257(2).

The reference in section 1257(2) to a "statute of any state" encompasses State constitutional provisions, *Torcaso* v. *Watkins*, 367 U. S. 488; *Adamson* v. *California*, 332 U. S. 46; *Railway Express Agency* v. *Virginia*, 282 U. S. 440.

The cases cited in the preceding paragraph and *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, sustain the jurisdiction of this Court on this direct appeal.

The "validity" of a State statute has been held to have been sustained within the meaning of section 1257(2), when the State court holds the statute applicable to a particular state of facts, as against the contention that such an application is invalid on federal grounds, *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282.

Statutes Involved

Section 9-a of Article VI of the Constitution of the State of New York, which may be found in McKinney's Consolidated Laws of New York Annotated, Book 2, Part 2, is Appendix E, hereto; and section 22, which superseded it, is Appendix F, hereto.

Questions Presented

1. Whether Article VI, section 9-a, of the New York State Constitution, in effect prior to September 1, 1962, and Article VI, section 22, of the New York State Constitution, in effect on and after September 1, 1962, are unconstitutional on the face of each of them and as applied herein,

in that they deny to appellant due process of law in violation of the Fourteenth Amendment to the United States Constitution, by authorizing the hearing and the adjudication of charges made against appellant for his removal as a duly elected Justice of the Supreme Court of the State of New York by the same tribunal which investigated, preferred and prosecuted the said charges, with the aid of their designated counsel.

2. Whether Article VI, section 9-a of the New York State Constitution, in effect prior to September 1, 1962, and Article VI, section 22, of the New York State Constitution in effect on and after September 1, 1962, are unconstitutional on the face of each of them and as applied herein, by reason of their being vague and indefinite in violation of Fourteenth Amendment due process, in so far as they purport to authorize the removal of a duly elected Justice of the Supreme Court of the State of New York, such as appellant herein, "for cause," without providing any definite rules or standards to define the meaning of that term.

3. Whether appellant was denied Fourteenth Amendment due process by depriving him of his office and emoluments as a Justice of the Supreme Court of the State of New York, by a tribunal which, when originally composed, was made up of only four members instead of the six mandated by the New York State Constitution (sec. 9a, sub. (1)); and of which four members, only one was from the Court of Appeals instead of two, as required by said section.

4. Whether appellant was denied Fourteenth Amendment due process in that he was tried on two charges not contained in the Statement of Charges served upon him; and in that the tribunal proceeded to the trial without giving the notice to the Governor and Legislature required to be given by the New York State Constitution (sec. 22, e).

Statement

Appellant was elected as a Justice of the Supreme Court of the State of New York, Second Judicial District, for a term of fourteen years (New York State Constitution, art. VI, sec. 4; now art. VI, sec. 6, c) commencing with January 1, 1957, and terminating December 31, 1970. He was the candidate of the three major political parties of the State, and was elected without opposition by more than a million votes, after having served as such a justice through appointment by the Governor of the State of New York for a period of approximately fifteen months (R., Vol. II, 1242a, 1243a; affidavit of appellant, attached to motion to vacate, p. 1).

The Charges

The charges served upon appellant, annexed hereto as Appendix G, were made after appellant had served in his judicial office for a total period of approximately seven years (Oct. 1955—Aug. 1962). They are in no way related to his judicial duties or conduct on the bench. They allege in substance that appellant obstructed a judicial inquiry of attorneys in Brooklyn, New York, directed in 1957 by the Appellate Division, Second Department, by keeping certain financial records of himself and his brother in his Judicial Chambers, and refusing to surrender them when requested to do so (Appendix G).

The proof in the case showed without contradiction, that an unlimited and full examination and inspection of all records in appellant's possession was offered to the representatives of the inquiry (R., Vol. III, 1053a-1056a), conditioned only on a reasonable arrangement to prevent publicity leaks and to retain appellant's control over those records. The difference was only where the examination should take place, and whether appellant was obliged to make complete surrender of his books and records.

Justice Gerald Nolan, Presiding Justice of the Appellate Division, Second Department at the time, submitted a statement to the Court on the Judiciary (received by consent in lieu of his testimony, Ex. 3, attached to R., Vol. IV) reading as follows:

> "I have been asked by Justice Louis L. Friedman if I could recall a conversation that I had with him in 1957 relative to the judicial inquiry then being conducted by Mr. Justice Arkwright, pursuant to an order of the Appellate Division, Second Department. I have a distinct recollection of the substance of the conversation, although I am unable to remember all the details or the precise time when the conversation took place. My best recollection is that it was in the fall of 1957 and that at that time Judge Friedman had not been served with a subpoena to appear before the Additional Special Term or to produce any of the records in his possession. At his request I saw him in my chambers at the Appellate Division Courthouse in Brooklyn. He stated that he had heard rumors, which he believed to have emanated from the inquiry, that his personal conduct was under investigaton, which caused him considerable concern because he knew that it was the policy of our court that names of persons under investigation should not be disclosed. He also stated that he had been requested to appear and produce books and records at the Additional Special Term presided over by Judge Arkwright, that he had offered to make the books and records available for inspection at his chambers, but that the offer had been rejected.
>
> It was, he said, a matter of common knowledge at the courthouse whenever anyone of any prominence was called as a witness before the judicial inquiry, and that it would be a matter of considerable embarrassment to him if he should be required to appear before the inquiry, and produce his books and records in open court. He was willing, he said, to make the books and records available for inspection at his chambers, and believed that he should be spared, if

possible, the embarrassment of an appearance before the Additional Special Term. He inquired whether our court would take some action so as to provide that his books and records might be produced at some place other than at the Additional Special Term. I stated to him that I would submit his inquiry to the members of our court. I did so, a few days later, and it was decided that the court should not intervene, or instruct Judge Arkwright as to the manner in which he should proceed. I so informed Judge Friedman."

Dennis M. Hurley, counsel to the Judiciary Inquiry, conceded that the records were offered to him for inspection in appellant's chambers (R., Vol. III, 934a, 951a, 958a).

Jackson A. Dykman, former president of the New York State Bar Association (R., Vol. II, 622a), offered the use of his own nearby law office for the examination of the records, (R., Vol. II, 514a, 594a, 595a, 641a, 642a; Vol. IV, 1373a-1375a), an offer which Mr. Hurley recommended be accepted (R., Vol. III, 1189a, bottom of page), but which Justice George A. Arkwright, then in charge of the inquiry, rejected (R., Vol. II, 512a). There was some personal acrimony between appellant and Justice Arkwright (R., Vol. II, 532a, 533a, 787a), but the record does not show that this was the reason for the rejection of the offer or of the proceedings which followed.

Mr. Justice Edward G. Baker succeeded to the inquiry in place of Justice Arkwright. Justice Baker stated that if he had been presiding at the time, he would have accepted the offer (R., Vol. 11, 569a), and that immediately after his own appointment as Presiding Justice over the inquiry, appellant stated that his books and records were available for inspection (R., Vol. II, 569a).

As a matter of fact, Justice Baker changed the procedure with respect to examination of financial records sought by the inquiry, stating as follows (in a wholly un-

related case, see Exhibit 2, p. 2, attached to inside back cover, R., Vol. IV).

> "The Court: Perhaps I should say preliminarily that in other situations where attorneys have hesitated or refused to produce and leave with us the records subpoenaed we have gone along with the suggestion that those records be examined from day to day as long as may be necessary, in the offices of the attorneys under inquiry, and with any reasonable condition that might be imposed by those attorneys. For example, having some one of the office there while the records are examined, and we are perfectly willing, I think I should say for the record, in this instance, to do the same thing. If it is a question of surrendering and leaving the records you need not be concerned with it because we are perfectly willing to have our accountants or an attorney of the staff, or both, whoever it may be decided should look at them, go to your office or any other place which may be convenient, to examine those records, and we have no objection whatever to your having someone there during the course of the examination."

Existing case law did not require the surrender of books and records, even under subpoena, but merely their production for inspection. *Matter of Atlas Lathing* v. *Bennett*, 176 Misc. 959 (N. Y.); *Matter of Kelly*, 19 F. R. D. 269; *Matter of Bendix Aviation Corp.*, 58 F. Supp. 953; see also *Hagan*, "Impounding and the Subpoena Duces Tecum," 26 Brooklyn Law Review 199.

The only reason stated by the representatives of the Judicial Inquiry for refusing all offers of inspection and examination, unless the records were surrendered to them, was that it did not suit their convenience (R., Vol. II, 595a; Vol. III, 956a, 958a, 959a) even though the suggested places were either across the street or around the corner from the inquiry office (R., Vol. IV, 1265a).

Mr. Jackson A. Dykman and Mr. Theodore Kiendl, called into consultation when the offers for inspection were refused by the inquiry, advised appellant that his position, that examination of the records should take place without requiring that they be surrendered, was legally justified (R., Vol. II, 640a, 685a, 686a, 765a, 766a). Appellant was willing to have the financial records of himself and his brother examined, seeking only to avoid publicity and loss of complete control (R., Vol. II, 548a-551a, 672a-679a, 686a-689a). In any event, the financial records were later on inspected and examined for over a period of about a year and a half (R., Vol. IV, 1371a), under security arrangements made by Mr. Justice Baker (R., Vol. II, 556a, 780a, 781a).

It appears clearly from the record that appellant had good reason to take steps to protect his reputation against unjust attack. He was vilified through a great deal of newspaper publicity (R., Vol. II, 548a-551a, 679a, 680a, 686a-689a; Vol. IV, 1366a-1368a), which commenced on January 8, 1958 and continued unabated until May, 1962. Scurrilous references were made about him, including particularly offensive stories about ambulance chasing activities, even though not a single ambulance chasing charge was ever made against either him or his brother (R., Vol. IV, 1369a). Justice Baker, on one occasion, agreed that appellant "had every reason to complain" about the publicity "because it appeared that somebody in the inquiry evidently had violated a confidence, had spoken to reporters" (R., Vol. II, 548a).

Appellant was additionally embarrassed in his position on the bench through the issuance of subpoenas for his personal bank account (R., Vol. II, 702a, 770a; Vol. IV, 1281a); by being handed a letter from the Judicial Inquiry in his own courtroom and across the bench, with a loud public announcement as to whom it was from (R., Vol. II, 691a; Vol. IV, 1271a); by having an investigator from the

inquiry sitting in his courtroom for three days to observe appellant's actions on the bench (R., Vol. IV, 1285a); by subpoenaing the personal Clerk attached to his chambers and inquiring about appellant's conduct there (R., Vol. IV, 1285a); and by calling in lawyers who had appeared in a litigation before him to inquire about his conduct in the case (R., Vol. IV, 1285a).

Such an investigation went far beyond the authority given to the Judicial Inquiry. Appellant took the position that he was justified in seeking to protect himself against these invasions of his reputation, since judges, not being wholly free to protect themselves against unjust attack (Canon 1, Canons of Professional Ethics), must sometimes adopt indirect methods to avert unjust criticism and clamor (R., Vol. II, 763a).

Appellant's possession of the financial records of his brother and of his former partnership came about in the following way.

Appellant's brother was a practicing attorney in Kings County, New York State. Prior to his ascension to the Bench, appellant had been in partnership with that brother, practicing under the firm name of Friedman & Friedman (R., Vol. II, 649a, 650a). Upon his appointment to the Bench, procedures were instituted for the liquidation of the partnership. Because of the large volume of litigation pending at the time when the partnership terminated, the liquidation extended over a period of several years (R., 1247a, 1248a).

Because of appellant's continued responsibility to file income tax reports of the liquidating partnership, and to pay the tax due thereon (R., Vol. IV, 1361a), his prior accounting experience and his prior supervision of the firm's bookkeeping records (R., Vol. II, 652a-659a; Vol. IV, 1313a), appellant, with the consent of his brother, moved the firm records to Chambers when he ascended the Bench (R., Vol.

II, 659a). The firm accountant would call at appellant's chambers to record the necessary entries, and since the method of liquidation made it necessary that the liquidation set of books and the surviving partner's bookkeeping records be co-related to each other, the individual books of the remaining partner were also kept in appellant's chambers. Both sets of books were worked on together by the accountant (R., Vol. II, 694a, 738a; Vol. IV, 1309a-1312a).

In addition to the charges already referred to, appellant was tried on two *additional* charges not included in the statement of charges served upon him. These additional charges were (1) that appellant practiced law while serving as a Justice of the Court, in a matter known as *Shevak*, and (2) that he failed to declare properly and pay income taxes (minutes of Dec. 10, 1962, attached to R., Vol. I, pp. 6-14).

The Court on the Judiciary was unanimous in exonerating appellant on the income tax charge (see Appendix A, which makes no finding of guilt on this charge).

Respecting the so-called "practice of law" charge, this is the way counsel designated to conduct the inquiry described it (see minutes of Dec. 10, 1962, p. 14, attached to R., Vol. I):

> "On the Shevak matter—while it may well have been an act of friendship on the part of Judge Friedman, and certainly there's no evidence of any fee having been obtained for this act. Nevertheless it boils down to the practice of the law—because he called up the President of the American Fore about the matter, it was referred to an investigator of that company and then he proceeded to negotiate with the investigator to get the settlement price up to $3,000. And in addition he told the American Fore people that they weren't to pay any attention to the other lawyer who had originally been in the case and had filed the notice that such a claim would be

made. I think it's an incident which perhaps taken alone *would not be sufficient for removal*—but considered as against all the other charges, it's indicative of the character of the man and what he has done that warrants removal." (emphasis supplied)

The record shows that the Shevack matter involves a perfectly innocent incident shortly after appellant's ascension to the Bench when, out of purely humanitarian motives and without the slightest thought of personal gain, he responded to a call from a neighbor to help protect an infant's money from threatened misappropriation by a father who had abandoned the infant (R., Vol. IV, 1330a-1349a).

The constitutional provisions set forth in Appendices E and F both provide that action of the Court on the Judiciary shall extend to removal from office, or removal from office and disqualification to hold and enjoy any public office of honor, trust or profit in the State of New York. The disqualification was obviously included in the instant provision to permit the court to bar the holding of a public position by one who was guilty of grave misconduct. No such disqualification is included in the instant order of removal (Appendix A). There was not even a claim that appellant was in any way corrupt, or that he misconducted himself in his function as a judge.

Court on the Judiciary as Investigator, Preferrer, Prosecutor, and Trier of the Charges

The subject sections of the New York State Constitution provide that a Justice of the Supreme Court may be removed "for cause" by a court on the judiciary; that such a court may be convened by the Chief Judge of the Court of Appeals upon his own motion, and shall be convened upon a written request by a Presiding Justice of the Appellate Division of the Supreme Court, amongst others; that the justice charged must be served with a statement of

the charges alleged for his removal; that the Chief Judge of the Court of Appeals shall act as presiding officer of the court; that after said court has convened and charges have been preferred, certain notices shall be given by the presiding officer to the Governor and the Legislature in order to give the Legislature a first opportunity to try the charges; and that the Court on the Judiciary shall have power to designate an attorney or attorneys to act as counsel to conduct the proceedings.

On July 2, 1962, the Presiding Justice of the Appellate Division, Second Department, requested the Chief Judge to convene a Court on the Judiciary "to consider matters involving the conduct of Mr. Justice Louis L. Friedman, a Justice of the Supreme Court, State of New York, Second Judicial District," arising "out of matters disclosed in a report of Mr. Justice Bernard S. Meyer, filed in this Court (the Appellate Division, Second Department) in a proceeding entitled 'In the Matter of M. Malcolm Friedman, an Attorney, Denis M. Hurley, Petitioner; M. Malcolm Friedman, Respondent'." (R., Vol. I, p. 1 of Clerk's Minutes attached to inside back cover.)

Pursuant to that request the Chief Judge sent out a call to convene the Court for August 15, 1962 (same reference). On that day the Court on the Judiciary "determined preliminarily that sufficient cause exists for the preferral of charges" (see same clerk's minutes, p. 3, last ¶ of Statement of Charges; as well as letter of Presiding Judge Desmond ¶(6) attached to the affidavit on the motion to vacate the removal order). A press release issued by said Court on the Judiciary stated that the Court had "determined preliminarily that sufficient facts were disclosed as to the conduct of Justice Friedman for the preferral of charges for removal from office" (see p. 1 of release attached to same affidavit on the motion to vacate the removal order). On the same day John R. Davison, Esq. and William R. Brennan, Esq. were designated by the

said Court to act as counsel to conduct the proceeding. The said counsel then submitted proposed charges to be made by them to the Court; the Court determined that the charges were in form fairly permitting an answer; directed them to be entered in the minutes; and further directed that counsel serve them upon appellant (R., same clerk's minutes, entries under date of Aug. 15, 1962). Counsel so designated by the Court are paid fees and expenses by order of the Presiding Judge of the Court, who fixes the amount thereof (Chapters 1 and 203, New York State Laws of 1963, Total Appropriation for Court on the Judiciary in Chapter 1, $26,000, and in Chapter 203, $16,000).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND IMPORTANT

I

The Court on the Judiciary acted as preferrer, prosecutor and trier of the charges, and thus violated due process under the doctrine of *In re Murchison*, 349 U. S. 133.

Appellant was elected for a term of office which normally would have expired on December 31, 1970. He had a constitutional right to that office and its emoluments, entitled to the protection of due process, *Torcaso* v. *Watkins*, 367 U. S. 488, 495, 496; *Slochower* v. *Board of Education*, 350 U. S. 551, 555-557; *Wieman* v. *Updegraff*, 344 U. S. 183, 191-192. As a member of the pension system of both the City and State of New York, appellant has a property right therein because of contributions made by him into the State Pension Fund as a member of the Assembly, as a Senator and as a Justice of the Supreme Court during the past twenty-two years, and into the City Pension Fund during the past seven years (see Article V, Section 7 of the New York State Constitution).

Section 2 of the Judiciary Law of the State of New York makes "a court on the judiciary" a court of record (McKinney's Consolidated Laws of New York Annotated, Book 29). As such, it is invested with judicial functions. By exceeding such functions, the said court violated due process under the doctrine of *In re Murchison*, 349 U. S. 133. Here such functions were exceeded when the court determined preliminarily that the facts of the instant case constituted sufficient or probable cause for making the charges, and directed that counsel designated by the Court prefer and prosecute them. That is normally a prosecutorial or investigating body's function. It compares to a grand jury function in a criminal case.

Designated counsel were an integral part of the court. Designated and directed by the court to prefer and prosecute the charges, the amount of their compensation was fixed by the Presiding Judge (Chapters 1 and 203 of the Laws of New York, 1963; appropriations for Court on the Judiciary), and depended in the first instance, on the institution and pendency of the proceeding against appellant.

Pertinently, *In re Murchison*, 349 U. S. 133, 137, *supra*, contains the following:

> "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. Perhaps no State has ever forced a defendant to accept grand jurors as proper trial jurors to pass on charges growing out of their hearings. A single 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."

There can be no question but that under the subject provisions of the New York State Constitution, the Court on the Judiciary itself or by its designated counsel has the function both of investigation *and* trial (sub. (6)(c) of sec. 9a, and sub. f. of sec. 22). Both subject sections provide that the Court on the Judiciary has the power to make its own rules and regulations concerning the procedure to be adopted "for the investigation and trial" of a judicial officer.

The Queen v. *The London County Council* (*Ex parte Akkersdyk et al.*), 1 Q. B. 190 (1892), is another case in point. There four members of the Council had retained an attorney to appear in opposition to an application which was before that Council. Even though the four members present did not vote on the question, the Queens Bench Division held that the proceedings were not in accordance with law, that they violated due process, and that they were void. In setting aside the determination of the London County Council, the Court said (p. 195):

> "In our judgment, the London County Council are adjudicating as to whether a man is or is not to be deprived of his license; to use the words of Cotton, L. J., in *Leeson* v. *General Council of Medical Education*, 'Though not in the ordinary sense judges, they have to decide judicially as to whether or not the complaint made is well founded.' In our judgment, when so acting, they are not emancipated from the ordinary principles upon which justice is administered in this kingdom, and which are, as it has been said, founded on its very essence. • • • Then why is an adjudication in which gentlemen have acted both as judges and accusers at the same time to be upheld? There is a sequence of authority holding that it cannot be, and it suffices to quote a passage from the judgment of Cotton, L. J., in the case above named, in which he says: 'Of course the rule is very plain, that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgment to decide in that particular case, either in his own case, or in any case where he brings

> forward the accusation or complaint on which the order is made'."

In a recent case, (June 1962) the Circuit Court of the District of Columbia considered the question of whether a proceeding before the Securities and Exchange Commission was tainted by reason of failure of due process, *Amos Treat & Co.* v. *S. E. C.*, 306 F. 2d 260. The opinion shows that one of the Commissioners who was sitting at the time of the hearing had been a member and Director of the Securities & Exchange Commission's Division of Corporation Finance, which had previously instituted an informal investigation involving a certain registration statement filed by petitioner. This Director was thereafter appointed as a member of the Commission itself and sat at the hearing.

When the hearing took place, the appellant, upon learning of the identity of the Commissioner and of the fact that he had been the Director of the Division which had instituted the investigation, and that he was also a member of the quorum of the Commission which had promulgated the ruling sought to be enforced, moved that the hearing be annulled. The Commissioner thereupon disqualified himself from further participation, and did not vote on the decision.

The Circuit Court, explicitly on due process grounds, annulled the determination made by the Commission. Citing *In re Murchison*, 349 U. S. 133, *supra*, and *Berkshire Employees Assn.* v. *National Labor Relations Board*, 121 F. 2d 235, the Circuit Court said (p. 266):

> "We are unable to accept the view that a member of an investigative or prosecuting staff may initiate an investigation, weight its results, perhaps then recommend the filing of charges, and thereafter become a member of that commission or agency, participate in adjudicatory proceedings, join in commission or agency rulings and ultimately pass upon the possible amenability of the respondents to the administrative orders of the commission or agency."

Having participated in the original inquiry as to whether charges should be made, and the preliminary determination to do so, the Court on the Judiciary was disqualified from thereafter proceeding to hold a hearing. *People* v. *Haas*, 105 App. Div. 119, 122-123, states:

> "• • • No effort of the will can shut out memory; there is no art of forgetting • • •."

In *Reger* v. *Mulrooney*, 241 App. Div. 38 (N. Y.), a determination of the Police Commissioner removing policemen from their office was annulled because the deputy police commissioner who heard the testimony and made the findings of fact was disqualified from hearing the matter, and yet proceeded to do so. The Court held that in passing upon the charges made against the police officers, "the commissioner exercised all the functions of a judicial officer." Having "thus acted in a judicial capacity," he was required to do so only by means of due process.

A question of due process was considered in the matter of *In Schlesinger Appeal*, 404 Pa. 584 (1961) (Supreme Court of Pennsylvania). In overruling for failure of due process, a determination which disbarred an attorney, the Court held (pp. 597-598):

> "The functions of prosecutor, judge and jury were combined in one body, namely, the Committee on Offenses, which lodged and prosecuted and, through its Subcommittee of three of its own members, adjudicated the charge of unprofessional conduct whereon the Court of Common Pleas, without any hearing of witnesses, ultimately entered the order disbarring the appellant. The full Committee on Offenses consisted of fifteen members of the Bar of Allegheny County, jointly appointed by the President Judge of the Court of Common Pleas of the County and the President of the Allegheny County Bar Association. This Commitee, acting on its own initiative, lodged with Schlesinger the complaint charging him with 'professional misconduct.' The

Committee appointed counsel to prosecute, on its behalf, the charges before its Subcommittee, to which the Committee referred the complaint for hearing, report and recommendation thereon. The appellant challenged for cause each of the members of the Committee on the ground, inter alia, that 'Each said member individually and jointly with all other members of the Committee is a complaining party herein and is attempting to sit in judgment upon his own cause.' The challenge was rejected. The Committee, as prosecutor, called and examined its witnesses against the appellant and vigorously conducted an adversary proceeding against him before its own Subcommittee which, as judge, presided over the hearings, passed upon the credibility of the witnesses, determined the inferences to be drawn from their testimony, and deduced therefrom the facts which it found. The Committee also passed upon and approved the *quantum* of compensation to be paid its witnesses."

After quoting from *In re Murchison*, 349 U. S. 133, *supra*, the Court continued:

"Here, a member of the bar, charged with unprofessional conduct by a bar Committee on Offenses, was prosecuted on the Committee's complaint before a Subcommittee, composed of three members of the Committee, sitting as the trial tribunal. In such a procedure, so contrary to traditional American juridical concepts, unfairness was, ipso facto, inherent; it was fraught with the possibility of temptation to each member of the trial tribunal to favor, consciously or unconsciously, the prosecuting body which appointed him and of which he was a member. The record as a whole contains a reasonable basis for doubt as to whether impartiality on the part of the members of the tribunal was completely absent and suggests an unsympathetic predisposition toward the appellant. Moreover, a predilection to favor one side over the other is not required in order to vitiate a judicial proceeding as being violative of due process. Merely, 'a possible temptation to the aver-

> age man as a judge * * * not to hold the balance nice, clear and true' is sufficient. Such 'a possible temptation' was implicit in the proceeding before the prosecutor's own Subcommittee which resulted in appellant's disbarment."

The opinion of the Supreme Court of Pennsylvania cites other authorities where similar failures of due process had occurred by reason of the fact that the functions of prosecutor and judge had been lodged in the same body, and where the Court had annulled determinations made under such circumstances.

In *Matter of Richardson* v. *Scudder*, 247 N. Y. 401, Judge Cardozo described the procedure which had been followed there by a Supreme Court Justice appointed by the Governor to conduct an investigation, and concluded that since "a preliminary investigation * * * was 'a search by an inquisitor'," the justice who supervised such an investigation should not also sit as a justice upon the main question involved. There, too, as in the present proceeding, the Court had appointed counsel to conduct an investigation.

In England many years ago, (1908), Lord Russell said, "That it is possible very effectively to poison the fountain of justice before it begins to flow." *In re Parke*, 2 K. B. 432.

Quoting again from *In re Murchison*, 349 U. S. 133, 136:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

Both the substance and the spirit of due process as prescribed by the doctrine of *Murchison* are violated by the instant provisions of the New York State Constitution as applied herein, which explicitly lodge the functions of

"investigation and trial" in the Court on the Judiciary, and the function of prosecution as well by the power to designate and pay for counsel to prosecute the proceeding.

II

The instant sections of the New York State Constitution violate Fourteenth Amendment due process for vagueness, in that they purport to authorize removal for "cause" without providing any standards to define the meaning of that term.

Since there are no standards provided (cf. *Matter of Droege,* 197 N. Y. 44, 51), the "cause" for removal is left entirely to the judgment, whim or even caprice of the judges, who at any given time make up a Court on the Judiciary. As was written in *Droege* (pp. 51-52):

> "• • • Neither the constitution nor the statutes have attempted to define what that 'cause' shall be.",

by reason of which, it is left entirely and exclusively to the "discretion" of the removal tribunal. Thus one bench, with no standards to guide them, may determine that removal should be accomplished for conduct which other judges, sitting on another occasion, or even in the same proceeding, may consider perfectly proper. [Cf., the proceedings in the instant case where four judges held appellant's conduct sufficient "cause" for removal, while two others voted to dismiss the charges; and where the majority held the Shevack incident sufficient "cause" for removal, even though their own designated counsel agreed that it was not. (See *infra,* p. 12 this statement, bottom of page.)]

With no guideposts to show the way or compass by which to steer, the independence of the judiciary hangs in

the balance. No judge can ever be sure that actions which he considers perfectly proper, may not some day be construed by some court on the judiciary to be "cause" for his removal.

The danger of such a situation is particularly magnified since the removal section (9a, now 22 of Article VI), makes no provisions for appeal or other review of what constitutes "Cause." (See opinion of Appellate Division, Third Department, Appendix D, hereto, p. 38, in the instant case, holding that there is no right or method of direct review even on jurisdictional grounds, because of the hierarchical scheme of courts in New York State.)

The vagueness of the instant provisions violates federal due process (*Cramp* v. *Board of Public Instruction of Orange County*, 368 U. S. 278, and the cases therein cited). In *Cramp*, the facts were that a Florida statute required every employee of the state to execute an affidavit in writing that he had never lent his "aid, support, advice, counsel or influence to the Communist Party." The law directed immediate discharge of any employee who failed to file such an oath. Appellant was a teacher in one of the public schools of the state and refused to file the required oath. Alleging that he had done none of the things mentioned in the statute, and that its meaning was so vague as to deprive him of liberty or property without due process of law, he brought an action in the state court for a judgment declaring the statute unconstitutional and enjoining its enforcement. The highest state court denied him relief. The United States Supreme Court reversed, and granted him judgment, stating the applicable principles as follows (287):

> "We think this case demonstrably falls within the compass of those decisions of the Court which hold that '* * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application,

violates the first essential of due process of law.' Connally v. General Construction Co., 269 U. S. 385, 391. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' Lanzetta v. New Jersey, 306 U. S. 451, 453. 'Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula.' United States v. Cardiff, 344 U. S. 174, 176. 'In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.' (Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U. S. 210, 243.''

The same principles condemn the instant removal provisions as unconstitutional for vagueness.

III

Appellant was denied due process in that he was tried and removed from office by a body which was not a duly composed and constituted court under the mandate of the constitutional provision which authorized its creation.

Both section 9-a and the superseding section 22 provide that a Court on the Judiciary shall be composed of the Chief Judge of the Court of Appeals, the Senior Associate Judge of the Court of Appeals, and one Justice from each of the four Appellate Divisions of the State, designated by concurrence of the majority of the Justices of each such Appellate Division. The section further provides that in the *absence*, inability or disqualification of the Chief

Judge of the Court of Appeals, or of the Senior Associate Judge of that Court, the Court of Appeals shall designate a judge or judges from the Court of Appeals to act in his or their stead. Thus, the Court on the Judiciary is required to be composed of six judges, two of whom must be from the Court of Appeals.

The Court on the Judiciary here violated the law of its existence in both respects. It was not composed of six judges, nor were there two judges from the Court of Appeals. On August 15, 1962 when the court was first composed, and when it proceeded with respect to the various matters hereinabove discussed, there were present only four Judges in all, and only one of them was from the Court of Appeals. The Clerk's minutes of its meeting of August 15, 1962 show as follows (see p. 12, Clerk's minutes, attached to back cover of R., Vol. I):

> "Aug. 15. Court convened pursuant to notice from Presiding Judge Charles S. Desmond.
>
> Present:
> Hon. Charles S. Desmond
> Hon. Arthur D. Brennan
> Hon. William H. Coon
> Hon. Earle C. Bastow
>
> Absent:
> Hon. Marvin R. Dye
> Hon. Benjamin J. Rabin"

Judge Dye, who was absent, is a judge of the Court of Appeals. No other judge from that court was designated in his stead as required by the Constitution.

In this very matter, the opinion of the Appellate Division, Third Department (Appendix D, pp. 38, 41) states:

> "Moreover, due process of law requires that the court or other tribunal is competent and duly constituted."

Appellant's failure to object to the composition of the Court on the Judiciary was due to the circumstance that

he first became aware of the fact that the two judges had been absent on August 15, 1962, when *after* February 22, 1963, the clerk furnished appellant with a copy of the clerk's minutes, the only place where that fact is recorded. He then ascertained that one of those judges (Judge Dye) was in California, and the other (Justice Rabin) was in Europe. (See affidavit of appellant in support of motion to vacate, p. 7.) In addition, he was misled (albeit unintentionally), by three orders made by the Court on the Judiciary on that day, August 15, 1962, in which it is recited that all six judges were present, (see 3 orders dated August 15, 1962, attached to R., Vol. I, back cover), and by the Court's own press release already referred to (see undated release of Court on the Judiciary, attached to affidavit of appellant in support of motion to vacate), in which it is stated that "the *six judge body*" made the preliminary determinations (emphasis supplied).

IV

Appellant was denied due process in that he was tried on two charges not contained in the statement of charges served upon him; and the Court on the Judiciary proceeded to trial without giving notice to the Governor and Legislature as mandated by the New York State Constitution.

As already appears, the original statement of charges served upon appellant contained two specifications, followed by a broadside charge (Specification 3) that appellant violated unspecified Canons of Judicial Ethics, and caused his brother to violate the Canons of Professional Ethics (see Appendix G hereto). He was tried on two additional specific charges which were never served upon him, namely, the income tax matter and the Shevack claim (see typewritten minutes of proceedings before Court on the Judiciary under date Dec. 10, 1962, attached to R., Vol. 1, inside front cover).

Both section 9a and the superseding section 22 (Appendices E and F) required that the presiding officer of the Court on the Judiciary shall, at least 60 days before a hearing commences, give notice to the Governor, the President of the Senate (the President Pro Tem of the Senate under sec. 22), and to the Speaker of the Assembly "of the nature of the charges" and the date set for the trial thereof, which shall be at least sixty days thereafter. The sections further provide that in the event that any member of the Legislature shall prefer "the same charges" and such charges are entertained by a majority vote of the Assembly, the Court on the Judiciary shall be stayed pending the determination of the Legislature, which shall be exclusive and final. Here, the presiding officer of the Court on the Judiciary gave notice of two of the charges, and the alleged violation of the Canons of Ethics arising therefrom (Appendix G), but failed to give notice of the two additional charges which were added and allowed by the Court over objection on December 10, 1962, and upon which appellant was tried.

There was thus a violation of the fundamental requirement of notice and procedural due process.

V

Appellant will still be amenable to answer under the traditional procedures of address or trial before the Court for the Trial of Impeachments of New York State, though the instant provisions be declared unconstitutional.

Though appellant denies that he has done anything warranting removal, yet it must be pointed out, as will presently more fully appear, that there are other methods under the New York State Constitution by which he can be called to account. These other methods are the traditional ones and were exclusive until 1947, when the instant provision was first added.

In New York State, Article VI, sections 9 and 10 of the Constitution (in effect prior to September 1, 1962), provided two other methods of removal. Both of these sections were continued, with slight language changes, when the new Judiciary Article went into effect on September 1, 1962. Both of the new sections are still in effect (Art. VI, secs. 23 and 24).

While section 23 (former sec. 9) applies only to Judicial officers, and authorizes removal by legislative address (in some cases, by the Senate alone upon recommendation of the Governor), section 24 (former sec. 10) provides for removal of all State officers, including judges, only through impeachment by the Assembly followed by trial before a court for the trial of impeachments. The provisions creating that Court for the Trial of Impeachments were placed into the Judiciary Article of the Constitution in recognition of the fact that said Court is indeed a judicial tribunal, even though composed of the members of the State Senate and the Judges of the Court of Appeals. It is defined as a court of record (sec. 2, sub. 1, Judiciary Law, New York State, McKinney's Consolidated Laws, Book 29), and a court having original *criminal* jurisdiction (sec. 11, New York State Code of Criminal Procedure). The procedure of the Court, in addition to the provisions set out in Article VI, section 24 of the Constitution, is governed by sections 12-20 incl. and sections 118-131 incl. of the Code of Criminal Procedure. Recognizing the severity of the judgments of a court of impeachment, the legislature permits removal by that Court only "for wilful and corrupt misconduct in office" (sec. 12, Code of Criminal Procedure).

Thus, it is apparent that New York State has always recognized that a court proceeding for the removal of a State officer (including one holding high judicial office), as distinguished from removal by legislative address, is a criminal proceeding, in which an accused is entitled to be surrounded with all of the constitutional safeguards af-

forded a defendant in a criminal trial. Like in many other criminal actions where the penalty imposed does not include imprisonment, the punishment here meted out is loss of position and property. A finding of guilt imposes a forfeiture of office and the emoluments thereof, in addition to the loss of a good reputation, generally built up over many years.

In 1947, the third method for the impeachment and trial of high judicial officers was made part of the New York State Constitution (the instant section, Art. VI, sec. 9-a Appendix E hereto). Built upon a desire for expediency in the disposition of such a proceeding, it was labeled a "Removal" instead of "Impeachment" proceeding. No implementing legislation or statutory procedural controls, such as govern proceedings before the Court for the Trial of Impeachments, were ever enacted by the Legislature. The result was the creation of a judicial tribunal having the function of both impeachment and trial, devoid of federal due process protective provisions for those it impeached or accused, and authorized to remove for a "cause" which may be only the whim or caprice of those judges who happened to be members of the court at any given time.

VI

The highest New York State court has not yet passed upon the first impression question as to whether there is any form of state court review of a removal made by the Court on the Judiciary.

Appellant has other proceedings pending. Finding himself on the horns of a dilemma because the procedure is new, and faced with the various limitations of time prescribed by statutes and the rules of the respective courts, this appeal has been taken to this court at this time as a protective measure to insure that the time allowed for

appeal will not expire before the highest court of New York State determines whether there is or is not a right of review. If it should be ultimately determined, as has been urged by counsel designated by the Court on the Judiciary, that there is no right of review through State court procedure, then appellant would be barred from any method of relief, if this appeal had not been taken. As of the present writing, review has been attempted in the Appellate Division, Third Department, by way of both appeal and Article 78 Proceeding (New York Civil Practice Act) and that court has held that it does not have the power to review orders of the Court on the Judiciary (Appendix D hereto).

An application will shortly be made to the Appellate Division, and if denied, to the Court of Appeals, for leave to appeal to the Court of Appeals from the determination that review is not possible by reason of lack of power. Only when the Court of Appeals finally determines this question of power to review, can appellant definitely certify to this Court that the determination by the Court on the Judiciary is, or is not, that of the highest New York State court in the instant proceeding.

In addition, and in compliance with the opinion of the Appellate Division, Third Department, that collateral attack is possible, appellant, on the last day permitted by law to do so, has instituted a proceeding in the Supreme Court, New York County, for the payment of salary due him, on the theory that the order of the Court on the Judiciary is void by reason of lack of jurisdiction (*supra*). That proceeding, too, is being attacked by the same designated counsel, who have moved to intervene and dismiss the said proceeding on the same ground that no state court has jurisdiction to review. In his affidavit in support of that motion to dismiss, Mr. Davison, one of the designated counsel has stated:

> "• • • *deponent and Mr. Brennan were the parties designated by the court on the Judiciary to prefer*

> *the charges* which resulted in the determination of that court, which is here sought to be collaterally attacked." (Affidavit of John R. Davison, sworn to July 11, 1963, not part of this record, emphasis supplied.)

As of the time of this submission, the proceeding remains undetermined.

Appellant respectfully suggests that because of the unusual circumstances here present, determination by this Court of the question of jurisdiction, might be withheld until appellant has had the opportunity to file a supplemental statement (with this Court's permission) as to the ultimate determination made of the question of state court power to review.

VII

The questions presented are not only substantial but also important.

The questions presented are important because of the non-legislative removal procedures in so many states in the Union. They are important because the instant removal procedure of New York State stands alone in providing for the fusion of the preferral, prosecution, trial and ultimate disposition before the same body. They are important to the independence of the members of the judiciary all over the nation, for whose possible removal from office all impeachment procedures have been devised. They are important to the millions of voters who select the judges of New York State for a specified term, and whose constitutional prerogatives to do so should not be thwarted through unconstitutional methods. They are important to the more than a million voters who selected appellant for a term of office which would have normally expired in 1970. They are, of course, important to appellant, who now, after almost a quarter of a century of

devoted public service, finds the means of livelihood of himself and his family taken away through unconstitutional procedures, and by a majority of but one vote.

CONCLUSION

This appeal should be heard and decided on the merits.

Respectfully submitted,

THEODORE KIENDL,
Attorney and Counsel for Appellant,
Office & P. O. Address,
One Chase Manhattan Plaza,
New York, New York 1005.

RAPHAEL H. WEISSMAN,
of Counsel.

Appendix "A"

Order of Removal

STATE OF NEW YORK

COURT ON THE JUDICIARY

At a Court on the Judiciary for the State of New York held at on the twenty-second day of February A. D. 1963.

Present,

HON. CHARLES S. DESMOND, *Presiding.*

" MARVIN R. DYE,
" BENJAMIN J. RABIN,
" ARTHUR D. BRENNAN,
" WILLIAM H. COON,
" EARLE C. BASTOW.

In the Matter of the Proceedings pursuant to Section 9-a of Article VI of the Constitution in relation to LOUIS L. FRIEDMAN, Justice of the Supreme Court, Second Judicial District.

The Court on the Judiciary, having heard the proofs of the parties as stipulated and offered and the oral arguments of counsel and having examined the briefs of counsel, finds and decides as follows:

(1) That Louis L. Friedman interfered with and obstructed a Judicial Inquiry and Investigation ordered on the 21st day of January 1957 by the Appellate Division of the Supreme Court of the State of New York Second Judicial Department;

(2) That said Louis L. Friedman engaged in unethical and improper conduct in that, while a Justice

of the Supreme Court, he maintained in his judicial chambers exclusive custody, control and management of the moneys, accounts, books and financial records of the firms of Friedman and Friedman and M. Malcolm Friedman without properly preserving or accounting therefor and, moreover, would not surrender the same to M. Malcolm Friedman despite reasonable and proper demands therefor;

(3) That said Louis L. Friedman by his actions as to the Shevack claim violated and failed to observe the concept, spirit and letter of the canons of judicial ethics;

(4) That by the acts and omissions described in Findings Nos. 1, 2 and 3 hereinabove, said Louis L. Friedman abused his public office as a Justice of the Supreme Court of the State of New York;

(5) That said abuse of public office and said acts and omissions are sufficient cause for the removal from office of said Louis L. Friedman;

Now therefore it is ORDERED and ADJUDGED that said Louis L. Friedman be and he hereby is removed from his office as Justice of the Supreme Court of the State of New York.

All concur except Rabin and Brennan, JJ., who dissent and vote to dismiss the charges.

A copy

RAYMOND J. CANNON,
Clerk.

Appendix "B"

Order Denying Motion to Vacate

STATE OF NEW YORK

COURT ON THE JUDICIARY

At a Court on the Judiciary for the State of New York held at Albany on the third day of April A. D. 1963.

Present,

HON. CHARLES S. DESMOND,

Presiding.

" MARVIN R. DYE,
" BENJAMIN J. RABIN,
" ARTHUR D. BRENNAN,
" WILLIAM H. COON,
" EARLE C. BASTOW.

In the Matter of the Proceedings pursuant to Section 9-a of Article VI of the Constitution in relation to LOUIS L. FRIEDMAN, Justice of the Supreme Court, Second Judicial District.

An application having heretofore been made herein upon the petition of Louis L. Friedman sworn to on March 18, 1963 for an order requiring Counsel Designated to Conduct the Proceedings, to show cause why the order of removal entered herein on February 22, 1963 should not be vacated and why, in the meantime, and also pending final disposition of all proceedings that shall be taken herein the said order of removal should not be stayed and the Court having treated the proposed order to show cause as a notice of

motion and having duly considered all matters alleged in said petition, and the court having determined that the Court on the Judiciary had been duly convened pursuant to the Constitution and that at all of its sessions there were present members sufficient to constitute a quorum under the Court's rules adopted pursuant to the provisions of the Constitution, it is therefore

ORDERED that the motion be and the same hereby is denied.

CHARLES S. DESMOND,
Presiding Judge.

A Copy

RAYMOND J. CANNON,
Clerk.

Appendix "C"

Decision on Motion to Vacate

STATE OF NEW YORK

COURT ON THE JUDICIARY

DECISION

April 3, 1963

In the Matter of the Proceedings pursuant to Section 9-a of Article VI of the Constitution in relation to LOUIS L. FRIEDMAN, Justice of the Supreme Court, Second Judicial District.

The court having treated the proposed order to show cause as a notice of motion to vacate the court's determination and having duly considered the matter, denies said motion.

The Court on the Judiciary was duly convened pursuant to the Constitution and at all its sessions there were present members sufficient to constitute a quorum under the court's rules adopted pursuant to the provisions of the Constitution.

No opinion. All concur.

Appendix "D"

Opinion of Appellate Division—Third Department

REYNOLDS, *J.*:

Respondent moves to dismiss an appeal from, and an Article 78 proceeding to review, a determination of the Court on the Judiciary dated February 22, 1963, removing Justice Louis L. Friedman from his office as Justice of the Supreme Court. Respondent also moves to dismiss an appeal taken from the order dated April 3, 1963 by the Court on the Judiciary denying appellant's motion to vacate its order of February 22, 1963 removing appellant from his office. The appeal, petition and cross-motion of appellant also ask for a stay of the determination of the Court on the Judiciary until the issues in the appeal and/or Article 78 proceeding are decided by this court. The issues to be determined are: (1) Whether a judge removed from office by the Court on the Judiciary may review that determination by an appeal to this court. (2) Whether a removed judge may review his removal by an Article 78 proceeding in this court.

The Court on the Judiciary was established by Article VI, § 22 of the New York State Constitution and no right to appeal is provided for therein. Appellant contends that the instant determination is appealable for two reasons, First: That it is appealable as an order in a special proceeding under Civil Practice Act, § 631. Second: That this appeal must lie, despite the absence of statutory authority because appellant is attacking the jurisdiction of the Court on the Judiciary and the manner in which it conducted the proceedings leading to his removal. As to the first contention, Civil Practice Act, § 631(2) provides:

> "An appeal may be taken to the appellate division of the supreme court,
>
> " * * *
>
> "From an order, affecting a substantial right, made by a court of record possessing original juris-

diction, * * * in a special proceeding instituted in that court, * * * pursuant to a special statutory provision. * * *."

We agree that the determination affects a substantial right, that the Court on the Judiciary is a court of record possessing original jurisdiction, but *Matter of Droege* (197 N. Y. 44) precludes any review under this section by holding that a proceeding to remove a judge is not a "special proceeding." In *Droege*, which involved the removal of a New York City Magistrate the court indicated that because the Constitution merely provided that inferior court judges could be removed for cause and granted no power to any particular body to conduct removal proceedings the legislature could as well have granted that power to the governor or any state officer rather than to the Appellate Division, as it did. This being so the court decided that the proceeding should not be termed a "special proceeding," for it certainly would not have been if the legislature had granted removal powers to any officer or body other than a court. The situation in the instant case is strikingly similar for, although the Constitution empowers the Court on the Judiciary to remove judges, it also grants power to the legislature to stay those proceedings and deal with the matter of removal itself (Article VI, § 22[e]). If the legislature had done that in this case we could not call this a "special proceeding" and under the authority of *Droege* we may not do so on the facts herein.

Although *Droege* precludes any review here of the merits of the case it points up the distinction between such a review and the judicial power to determine whether the power of the Court on the Judiciary was properly exercised in the form required by the Constitution. In fact, *Droege* indicates that the latter type of review may be available under certain conditions which leads us to appellant's second

contention. Despite the fact that there may be no right to consider the merits under § 631(2) appellant claims that there is a limited right to appeal to consider whether the Court on the Judiciary had authority to render the order herein and whether the court pursued the procedure prescribed in the Constitution, and legally proceeded according to its own established rules. He further contends, that such a right of appeal exists independent of statute and even if the statute proscribes such an appeal. It will be seen that the answer to the problem is whether this court can handle the jurisdictional issues either by appeal or by an Article 78 proceeding depends on whether the Court on the Judiciary is an inferior tribunal or a court of coordinate or superior jurisdiction. As we have pointed out, *Droege* which precludes an appeal under § 631(2), is authority, under certain circumstances, for the limited right of appeal requested by appellant in the case at bar. He can reasonably argue that *Droege* establishes that he has a right to have the question of jurisdiction decided by some court, and the remaining question is whether it could be handled by this court. The pertinent language in *Droege* is found at pages 52 and 53 where the court, quoting from an earlier decision, notes that when the Constitution (or a statute) vests a discretionary or judicial power in any *inferior tribunal or officer*, a higher court has no further control over the exercise of such power "than to see that such inferior tribunal or officer, on the occasion of its exercise, had jurisdiction over the subject-matter of its exercise—that is, that the occasion or circumstances, contemplated by the Constitution or the act, for exercise had occurred—and that the power has been exercised in the form prescribed by the Constitution or the Act." vesting such power. This reasoning has been applied in many cases, always in the situation, however, where a "higher" court is examining a decision of an "inferior" court or officer, and especially where a statute has pre-

cluded judicial review of the decision of the court or official in question or is to the effect that the decision of the inferior tribunal shall be "final and conclusive." Thus in *Matter of Guardian Life Ins. Co.* v. *Bohlinger* (308 N. Y. 174), where the court was reviewing a determination of the Superintendent of Insurance, Judge Fuld opined at page 183:

> "Even where judicial review is proscribed by statute, the courts have the power and the duty to make certain that the administrative official has not acted in excess of the grant of authority given him by statute or in disregard of the standard prescribed by the legislature."

(See also, *Matter of Merendino* v. *Graves*, 256 App. Div. 50; *Matter of Birmingham* v. *Graves*, 227 App. Div. 262, app. dmsd. 255 N. Y. 623, cert. den. 287 U. S. 669; *Matter of Skinkle*, 221 App. Div. 682.) The theory involved is that a court (or administrative officer or body) must have jurisdiction in order to render a valid judgment or determination of any kind binding upon the parties concerned. A judgment or determination granted without jurisdiction (meaning authority to render a judgment or determination which the court or officer assumes to do) is not entitled to full faith and credit in another state and may be attacked either directly or collaterally (7 Carmody-Wait, 204). An appeal, of course, attacks such a judgment directly. Moreover, due process of law requires that the court or other tribunal is competent and duly constituted. Unless jurisdiction exists, the judgment rendered is not by due process of law (9 N. Y. Jurisprudence, Constitutional Law, § 350). But whether a court had jurisdiction in a certain case can only be determined by that court itself in the first instance and then in the final instance by a court of higher or superior jurisdiction to it (21 C. J. S. Courts, § 501). An appeal or other review on jurisdictional

grounds must comply with the hierarchical scheme of courts in the particular state involved. Thus the Appellate Division could not presume to answer whether the Court of Appeals had jurisdiction to render a judgment, while it would be the tribunal to answer jurisdictional questions addressed to the Supreme Court, Court of Claims, etc. The appellate jurisdiction of this court is a creature of statute. No appeal lies to the Appellate Division except by statutory authority, the absence of which precludes a right of appeal. (*Matter of Fischer* v. *Briante*, 6 A. D. 2d 814; *Matter of Anonymous* [*Hurley*], 6 A. D. 2d 1045; and see *Matter of Ryan* [*Hogan*], 306 N. Y. 11.) As stated by Judge Froessel, in the last cited case at 306 N. Y. 16; "It is well settled that appeal is not a matter of constitutional right, * * * such jurisdiction can never be assumed, unless a statute expressly authorizes its exercise * * *." It is our conclusion that the Court on the Judiciary is at least a court of co-ordinate jurisdiction (and probably superior jurisdiction) which precludes any relief at the level of the Appellate Division. In our view we cannot consider a review by way of an Article 78 proceeding, either in the nature of prohibition or certiorari because the Court on the Judiciary is at least a court of co-ordinate jurisdiction. In *Matter of Colin* v. *Appellate Division, First Department* (3 A. D. 2d 682, l. t. a. den. 2 N. Y. 2d 710), petitioner sought a restraining order in the Second Department to be issued against the First Department. The court in a unanimous memorandum decision denied relief.

> "At common law a writ of prohibition could issue only from a superior to an inferior court. (Chase's Blackstone's Comm. [3d ed.], p. 671). In this State it has always been recognized that such a writ could not issue to a branch of the same court or to a judicial officer of equal rank and powers

as the one granting the writ (*Matter of Attorney-General*, 32 Misc. 1), but only to subordinate courts and inferior judicial tribunals. (*Appo* v. *People*, 20 N. Y. 531, 540; *Matter of Hogan* v. *Court of Gen. Sessions*, 296 N. Y. 1, 8; *People ex rel. Jimeson* v. *Shongo*, 83 Misc. 325, affd. 164 App. Div. 908; see, also, *Smith* v. *Whitney*, 116 U. S. 167, 176.) That is the basic theory underlying the provisions of article 78 of the Civil Practice Act, insofar as they apply to proceedings to restrain a body or officer exercising judicial or quasi-judicial functions from proceeding without or in excess of jurisdiction. Essentially, the subject matter of this proceeding is an application to this court to restrain a court of equal rank and power from enforcing a rule promulgated by the latter. We are, in effect, being asked to enjoin the possible or anticipated future action of such a court. The relief is not sought against the individual Justices in their personal capacities but, rather, against them as a court, regardless of the identity of its present or future members. Similarly, any restraining order, if issued, would necessarily have to be directed against them in their collective capacity as a court. Since we are without power to direct or control the action of a branch of the court which has co-ordinate jurisdiction, it follows that we are without jurisdiction to grant the relief requested."

The Court on the Judiciary is composed of the Chief Judge and Senior Associate Judge of the Court of Appeals and four Appellate Division Judges (Article VI, § 22[b]). As the entire makeup of the court consists of Judges of a higher court and equal courts it must be assumed that it is not an inferior tribunal. It has the power to remove Judges and Justices of the Court of Appeals, Supreme

Appendix "D"

Court, Court of Claims, County Court, Surrogate's Court and Family Court (Article VI, § 22[a]) while the Appellate Divisions have removal powers only over Judges of inferior courts, i.e., courts of the City of New York, district courts, town, village and city courts (Article VI, § 22 [i]).

Therefore, the appeals and the Article 78 proceeding should be dismissed because of lack of jurisdiction and the application for a stay denied.

Appendix "E"

State of New York, Constitution, Art. VI, § 9-a

[Removal or retirement of judges and justices by court on the judiciary.] § 9-a. (1) A judge of the court of appeals, a justice of the supreme court, a judge of the court of claims, a surrogate, a special surrogate, a judge of the court of general sessions of the county of New York, a county judge, a special county judge or a justice of a city court of record, may be removed or retired also by a court on the judiciary. The court shall be composed of the chief judge of the court of appeals, the senior associate judge of the court of appeals and one justice of the appellate division in each department designated by concurrence of a majority of the justices of such appellate division. In the absence, inability or disqualification of the chief judge of the court of appeals or of the senior associate judge of that court, the court of appeals shall designate a judge or judges from the court of appeals to act in his or their stead.

(2) No judicial officer shall be removed by virtue of this section except for cause or be retired except for mental or physical disability preventing the proper performance of his judicial duties, nor unless he shall have been served with a statement of the charges alleged for his removal or the grounds for his retirement, and shall have had an opportunity to be heard.

(3) The trial of charges for the removal of a judicial officer or of the grounds for his retirement shall be had before a court on the judiciary. The affirmative concurrence of not less than four members of the court shall be necessary for the removal or retirement of a judicial officer. The court in its discretion may suspend a judicial officer from the exercise of his office pending the determination

of the proceedings before the court. The action of the court shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any public office of honor, trust or profit under this state, or to retirement for disability; but any judicial officer whose removal is sought shall be liable to indictment and punishment according to law. A judicial officer retired for disability in accordance with this section shall thereafter receive such compensation as the legislature may provide.

(4) The chief judge of the court of appeals may convene the court on the judiciary upon his own motion, and shall convene the court upon written request by the governor or by the presiding justice of any appellate division or by a majority of the judicial council or a majority of the executive committee of the New York state bar association thereunto duly authorized. The chief judge of the court of appeals shall act as the presiding officer of the court but in the absence, inability or disqualification of the chief judge, the senior associate judge of the court of appeals sitting on the court shall act as the presiding officer. After the court on the judiciary has been convened and charges of removal have been preferred against a judicial officer, the presiding officer of the court shall give written notice to the governor, the president of the senate and the speaker of the assembly of the name of the judicial officer against whom such charges have been preferred, of the nature of the charges and the date set for the trial thereof, which date shall be not less than sixty days after the giving of such notice. Immediately upon receipt of such notice the legislature shall be deemed to be in session for the purpose of this proceeding.

(5) In the event that any member of the legislature shall, within thirty days after receipt of said notice, prefer the same charges against the judicial officer and such charges are entertained by a majority vote of the assembly

the court on the judiciary shall be stayed pending the determination of the legislature, which shall be exclusive and final. But a proceeding by the court on the judiciary for the retirement of a judicial officer for mental or physical disability preventing the proper performance of his judicial duties shall not be stayed.

(6) The court shall have power (a) to designate in each case involving a judicial officer an attorney or attorneys at law to act as counsel to conduct the proceeding; (b) to summon witnesses to appear and testify under oath and to compel the production of books, papers, documents and records before such counsel in advance of the trial and before the court upon the trial; (c) to make its own rules and regulations concerning the procedure to be adopted for the investigation and trial of a judicial officer; (d) to grant immunity from prosecution or punishment when the court deems it necessary and proper in order to compel the giving of testimony under oath and the production of books, papers, documents and records, and (e) shall have such further powers as the legislature may from time to time confer upon it.

(7) The judges and justices while exercising the powers of a court on the judiciary shall serve without additional compensation, but the legislature shall provide moneys by appropriation to meet the expenses of the court. (Added by vote of the people November 4, 1947.)

Appendix "F"

State of New York, Constitution, Art. VI, § 22

[Court on the judiciary; removal or retirement of certain judges by appellate division.] § 22. a. Any judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court or judge of the family court may be removed for cause or retired for mental or physical disability preventing the proper performance of his judicial duties after due notice and hearing by a court on the judiciary.

b. The court on the judiciary shall be composed of the chief judge of the court of appeals, the senior associate judge of the court of appeals and one justice of the appellate division of the supreme court in each judicial department designated by concurrence of a majority of the justices of each such appellate division of the supreme court. In the absence, inability or disqualification of the chief judge of the court of appeals or of the senior associate judge of the court of appeals, the court of appeals shall designate a judge or judges from the court of appeals to act in his or their stead. The chief judge of the court of appeals shall act as the presiding officer of the court but in the absence, inability or disqualification of the chief judge, the senior associate judge of the court of appeals sitting on the court shall act as the presiding officer.

c. The affirmative concurrence of not less than four members of the court shall be necessary for removal or retirement and the court may disqualify a judge or justice removed from office from again holding any public office of this state. Proceedings to remove or the removal of a judge or justice from office shall not prevent his indictment and punishment according to law. A judge or justice retired for disability in accordance with this section shall

thereafter receive such compensation as may be provided by law.

d. The chief judge of the court of appeals may convene the court on the judiciary upon his own motion and shall convene the court upon written request by the governor or by a presiding justice of the appellate division of the supreme court or by a majority of the executive committee of the New York State Bar Association thereunto duly authorized. The court in its discretion may suspend the judge or justice from the exercise of his office pending the determination of the removal or retirement proceedings before the court.

e. After the court on the judiciary has been convened and charges of removal or retirement have been preferred against a judge or justice, the presiding officer of the court on the judiciary shall, before a hearing on charges of removal for cause commences, give written notice to the governor, the temporary president of the senate and the speaker of the assembly of the name of the judge or justice against whom charges have been preferred, the nature of the charges and the date set for hearing these charges, which shall not be less than sixty days after the giving of such notice. Immediately upon receipt of such notice, the legislature shall be deemed to be in session for the purpose of this proceeding. If any member of the legislature prefers the same charges against the judge or justice concerned within thirty days after receipt of such notice and if such charges are entertained by a majority vote of the assembly, proceedings before the court on the judiciary shall be stayed pending the determination of the legislature which shall be exclusive and final. But a proceeding by the court on the judiciary for the retirement of a judge or justice for mental or physical disability preventing the proper performance of his judicial duties shall not be stayed.

f. The court on the judiciary shall have power to designate an attorney or attorneys at law to act as counsel to conduct the proceeding, to summon witnesses to appear and testify under oath and to compel the production of books, papers, documents and records before such counsel in advance of the trial and before the court upon the trial, to grant immunity from prosecution or punishment when the court deems it necessary and proper in order to compel the giving of testimony under oath and the production of books, papers, documents and records, and to make its own rules and procedures for the investigation and trial.

g. The court on the judiciary shall have such further powers and duties as may be provided by law.

h. The judges or justices while exercising the powers of a court on the judiciary shall serve without additional compensation but the legislature shall provide moneys by appropriation to meet the expenses of the court.

i. A judge of the courts for the city of New York established pursuant to section fifteen of this article, of the district court or of a town, village or city court outside the city of New York may, in the manner provided by law, be removed for cause or retired for disability after due notice and hearing by the appellate division of the supreme court of the judicial department of his residence.

Appendix "G"

The Charges

STATE OF NEW YORK
COURT ON THE JUDICIARY

In the Matter of the Proceedings pursuant to Section 9-a of Article VI of the Constitution in relation to Louis L. Friedman, Justice of the Supreme Court, Second Judicial District.

NOTICE

To:

Louis L. Friedman, Justice of the Supreme Court, Second Judicial District:

Please take notice that pursuant to Rule VI(a) of the Rules of the Court on the Judiciary you are required to serve upon the undersigned, counsel designated to conduct the proceedings, and to file with Raymond J. Cannon, Clerk of the Court on the Judiciary, whose address is Court of Appeals Hall, Albany, New York, an answer to the attached statement within 20 days after the service upon you of this notice and the attached statement, exclusive of the day of service.

Dated: August 15, 1962.

John R. Davison,
Counsel Designated to Conduct the Proceedings,
90 State Street,
Albany 7, New York,
and
William R. Brennan,
Counsel Designated to Conduct the Proceedings,
806-808 Morgan Building,
Pearl & Niagara Streets,
Buffalo, New York.

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Appendix "G"

STATE OF NEW YORK
COURT ON THE JUDICIARY

In the Matter of the Proceedings pursuant to Section 9-a of Article VI of the Constitution in relation to Louis L. Friedman, Justice of the Supreme Court, Second Judicial District.

STATEMENT OF THE CHARGES ALLEGED

That Louis L. Friedman has abused his public office as a Justice of the Supreme Court of the State of New York, Second Judicial District (1) by interfering with and obstructing a Judicial Inquiry and Investigation ordered by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, on the 21st day of January 1957; (2) by engaging in unethical and improper conduct in that, while a Justice of the Supreme Court, he maintained in his judicial chambers exclusive custody, control and management of the moneys, accounts, books and financial records of the firms of Friedman and Friedman and M. Malcolm Friedman without properly preserving or accounting therefor and, moreover, would not surrender the same to M. Malcolm Friedman despite reasonable and proper demands therefor; (3) by violating and failing to observe the concept, spirit and letter of the canons of judicial ethics, and by causing M. Malcolm Friedman to violate and to fail to observe the canons of professional ethics.

The Court on the Judiciary has pursuant to Rule V of its Rules determined preliminarily that sufficient cause exists

for the preferral of charges against Louis L. Friedman, Justice of the Supreme Court, Second Judicial District and that the foregoing "Statement of Charges Alleged" contains allegations of fact in a form fairly permitting an answer by him and has directed that a copy thereof be served on him with opportunity to answer within 20 days after such service upon him, exclusive of the day of service. Trial shall be held at the Court of Appeals Hall in the City of Albany on October 19, 1962 or as soon thereafter as the proceedings may be heard.

JOHN R. DAVISON,
Counsel Designated to Conduct
the Proceedings,
90 State Street,
Albany 7, New York,

and

WILLIAM R. BRENNAN,
Counsel Designated to Conduct
the Proceedings,
806-808 Morgan Building,
Pearl & Niagara Streets,
Buffalo, New York.

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IN THE

Supreme Court of the United States

October Term, 1963.

No. 285

IN THE MATTER
OF
The Proceedings Pursuant to Section 9-a (amended to Section 22) of Article VI of the Constitution

IN RELATION TO
LOUIS L. FRIEDMAN, Justice of the Supreme Court, Second Judicial District,

Appellant,

against

COURT ON THE JUDICIARY OF THE STATE OF NEW YORK, by JOHN R. DAVISON, Esq., and WILLIAM R. BRENNAN, Esq., Counsel Designated by Said Court to Conduct the Proceedings,

Appellee.

ON APPEAL FROM COURT ON THE JUDICIARY OF THE STATE OF NEW YORK.

Motion to Dismiss or Affirm and Brief in Support of Motion.

JOHN R. DAVISON,
Counsel Designated to Conduct the Proceedings,
90 State Street,
Albany 7, N. Y.

and

WILLIAM R. BRENNAN,
Counsel Designated to Conduct the Proceedings,
295 Main Street,
Buffalo 3, N. Y.

THE REPORTER COMPANY, INC., Walton, N. Y.—UN 5-4131—1963

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No Substantial Federal Question is Presented:

I. Appellant had no constitutional right to his office 39

II. Even if appellant had some right to the office of Justice of the Supreme Court of the State of New York within the protection of the Due Process Clause of the 14th Amendment, the Procedure of Article VI of the New York State Constitution is due process of law and appellant has had it 43

III. Article VI, Section 22 (formerly Section 9a), of the Constitution of the State of New York does not make the Court on the Judiciary both the accuser and judge in proceedings thereunder 44

IV. Neither appellant's proposed Question 2 nor his argument, Point II, in support thereof was mentioned in the Court on the Judiciary. In any event Question 2 is not presentable and the argument in support thereof is without merit 52

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V. The reach of federal due process does not extend to the composition and constitution of a state court for the removal of state officers under state law, but even if it does, the Court on the Judiciary which removed appellant from his state office for cause, after notice and hearing, was duly composed and constituted and appellant has had due process 54

VI. Appellant's Point IV (Jurisdictional Statement, pp. 26-27), is not only wrong, it's fraudulent 60

VII Appellant's Point V (pp. 27-29), presents no federal question and is irrelevant 61

VIII. The answer to Appellant's Point VI is that the right of an appeal on the merits is not guaranteed or mandated by the due process clause of the Federal Constitution so long as the denial of a right of appeal is not discriminatory 62

Conclusion. No substantial federal question is presented by this appeal and this Court should either grant the motion to dismiss or the motion to affirm 63

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IN THE

Supreme Court of the United States

October Term, 1963

No.

IN THE MATTER

of

The Proceedings Pursuant to Section 9-a (amended to Section 22) of Article VI of the Constitution,

In Relation to

LOUIS L. FRIEDMAN, Justice of the Supreme Court, Second Judicial District,

Appellant.

against

COURT ON THE JUDICIARY OF THE STATE OF NEW YORK, by John R. Davison, Esq. and William R. Brennan, Esq., Counsel Designated by Said Court to Conduct the Proceedings,

Appellee.

ON APPEAL FROM COURT ON THE JUDICIARY OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT OF MOTION.

Motion to Dismiss or Affirm.

To the Honorable, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

John R. Davison and William R. Brennan counsel designated by the Court on the Judiciary of the State of New York to conduct: Proceedings Pursuant to Section 9-a (now Section 22) of Article VI of the Constitution of the State of New York in Relation to Louis L. Friedman, Justice of the Supreme Court of the State of New York, Second Judicial District—move this Court under Rule 16(1)[b] of the Rules thereof to dismiss or affirm the above entitled case on the grounds that it does not present a substantial federal question; that the federal questions sought to be reviewed were not expressly passed on by the Court on the Judiciary of the State of New York, and one was not raised in the Court on the Judiciary, and that the judgment thereof rests on an adequate non-federal basis.

Nature of the Proceedings and the Determinations Made by the Court on the Judiciary of the State of New York.

These proceedings were instituted before the Court on the Judiciary of the State of New York by the preferral, on August 15, 1962, by the undersigned as counsel designated to conduct the proceedings, of charges against appellant, Louis L. Friedman, Justice of the Supreme Court of the State of New York, Second Judicial District for his removal from his public office for abuse thereof (1) by interfering with and obstructing a judicial inquiry and investigation order by the Appellate Division of the Supreme Court of the State of New York, Second Judicial

Department; (2) by engaging in unethical and improper conduct in that while a Justice of the Supreme Court of the State of New York, he maintained in his judicial chambers exclusive custody, control and management of the moneys, accounts, books and financial records of the firms of Friedman and Friedman and M. Malcolm Friedman without properly preserving or accounting therefor and would not surrender the same to M. Malcolm Friedman despite reasonable and proper demands therefor; (3) by violating and failing to observe the concept, spirit and letter of the canons of judicial ethics and by causing M. Malcolm Friedman to violate and to fail to observe the canons of professional ethics.

Section 9-a (now Section 22) of Article VI of the Constitution of the State of New York provides that a justice of the Supreme Court may be "removed" by a court on the judiciary but that no judicial officer shall be "removed" except "for cause" nor unless he shall have been served with a statement of the charges alleged for his removal and shall have had an opportunity to be heard and that the trial of charges for the removal of a judicial officer shall be had before a court on the judiciary and an affirmative concurrence of not less than four of the six members of the court is necessary for the removal of a judicial officer.

A statement of the foregoing charges alleged for appellant's removal from his judicial office was duly served on appellant (R. Vol. I, pp. 3a-4a). He was afforded an opportunity to be heard and after he served and filed an answer to the charges (R. Vol. I, pp. 5a-6a) a trial was had before the Court on the Judiciary. The trial consisted of (1) the submission to the Court of 1230 printed pages of testimony and the relevant exhibits referred to therein (R. Vols. I, II, III) adduced in a disciplinary proceeding against M. Malcolm Friedman, appellant's brother upon a stipulation; That if the

witnesses whose names appear in this record were personally called to testify in this proceeding they would each testify as set forth herein (R. Vol. I, p. 7a); (2) appellant's testimony and the testimony of one of his counsel before the entire Court on the Judiciary and the exhibits referred to therein (R. Vol. IV).

Before the trial, counsel for appellant orally moved on December 10, 1962, before the entire Court on the Judiciary (1) to have eliminated from the case any reference to the income tax matter and to the Shevack negligence claim as to which testimony had been adduced in the disciplinary proceeding involving appellant's brother and (2) for dismissal of the charges in accordance with paragraph Sixth of appellant's answer viz:

> "Sixth: That the procedures for the removal for cause of a Supreme Court Justice pursuant to Article VI, Section 9-a of the Constitution of the State of New York contravene the due process clause of the Fourteenth Amendment of the Constitution of the United States inasmuch as it requires that the same body preferring the charges should hear and determine them" (R. p. 6a).

The Court unanimously denied both motions.

Appellant did not ask for, as there was no need for, a bill of particulars as to the charges alleged. The Court on the Judiciary was convened and the charges were preferred on the basis of the conduct of appellant disclosed in a report of Mr. Justice Bernard S. Meyer filed in the Appellate Division of the Supreme Court, Second Judicial Department, in the disciplinary proceeding involving appellant's brother and appellant had a copy of that report which particularized the charges in these proceedings, as the stipulated part of the record volumes I, II, and III shows. In other words appellant was not

only well advised when he was served with the charges of the particulars of them but even of the evidence against him which he eventually stipulated.

After hearing and study of the proofs of the parties as stipulated and offered and the oral arguments of counsel the Court on the Judiciary found and decided by a vote of 4 to 2:

(1) That Louis L. Friedman interfered with and obstructed a Judicial Inquiry and Investigation ordered on the 21st day of January 1957 by the Appellate Division of the Supreme Court of the State of New York Second Judicial Department;

(2) That said Louis L. Friedman engaged in unethical and improper conduct in that, while a Justice of the Supreme Court, he maintained in his judicial chambers exclusive custody, control and management of the moneys, accounts, books and financial records of the firms of Friedman and Friedman and M. Malcolm Friedman without properly preserving or accounting therefor and, moreover, would not surrender the same to M. Malcolm Friedman despite reasonable and proper demands therefor;

(3) That said Louis L. Friedman by his actions as to the Shevack claim violated and failed to observe the concept, spirit and letter of the canons of judicial ethics;

(4) That by the acts and omissions described in Findings Nos. 1, 2 and 3 hereinabove, said Louis L. Friedman abused his public office as a Justice of the Supreme Court of the State of New York;

(5) That said abuse of public office and said acts and omissions are sufficient cause for the removal from office of said Louis L. Friedman.

Subsequent to that decision the Court on the Judiciary *unanimously* denied a motion by appellant to vacate that decision. The grounds of the motion included all but one, the second (Jurisdictional Statement, pp. 5, 22-24) of the grounds upon which this appeal purports to have been taken.

In short, the Court on the Judiciary thrice decided contrary to appellant's first question (Jurisdictional Statement, p. 4) and first point (*id.* pp. 15-22) that it did not *as a matter of fact* act as preferrer, prosecutor and trier of the charges: First, in denying, on January 11, 1963, the oral motion of December 10, 1962, to dismiss on the ground set forth in paragraph Sixth of the answer; Second, in ordering and adjudging on February 22, 1963, that appellant be removed from his office and thereby ruling against the renewal of the motion to dismiss the charges on that ground (R. Vol. I, p. 7a); Third in denying on April 3, 1963, the motion to vacate the removal order and judgment of February 22, 1963.

The second question appellant would present on this appeal and the second point he would make, i. e., "The instant sections of The New York State Constitution violate Fourteenth Amendment due process for vagueness, in that they purport to authorize removal for 'cause' without providing any standards to define the meaning of that term" (Jurisdictional Statement, pp. 5, 22-24) ***was never*** raised in the Court on the Judiciary or expressly passed upon by that Court for reasons obvious from the serious and substantial nature of the charges.

The Court on the Judiciary decided both *as matter of fact and as matter of law* that, contrary to appellant's third question and point (Jurisdictional Statement, pp. 5, 24-26) it was a duly composed and constituted court under the provisions of the New York Constitution.

The Court on the Judiciary thrice decided, contrary to appellant's fourth question and point (Jurisdictional Statement, pp. 5, 26-27), that appellant was not *as matter of fact* tried on two charges not contained in the statement of charges served upon him and of which no notice was given to the Governor and Legislature.

Statement.

Appellant was first appointed to the office of Justice of the Supreme Court of the State of New York on October 6, 1955, and then elected to it in November, 1956 (R. pp. 1242a-1243a). Before that he had been an Assemblyman and a Senator of this State and a financially successful lawyer specializing with his brother, Malcolm, in the practice of negligence law under the firm name of Friedman & Friedman, with offices at 130 Clinton Street, Brooklyn. For the year 1955, they reported their taxable partnership income was $269,923 (R. pp. 1243a, 1247a-1249a).

The day after he was appointed to the bench, i. e., on October 7, 1955, appellant decided that his brother, Malcolm, should file a certificate that he was doing business as Friedman & Friedman and on that day Malcolm filed a business certificate certifying that he was transacting business under the name of Friedman & Friedman at 130 Clinton Street, Brooklyn (R. pp. 694a-695a, Exh. SSSSS).

The Constitution of the State of New York prohibits a Justice of the Supreme Court from practicing law (Section 20[4] Art. VI and the law which authorizes the filing of a certificate showing that a business is being transacted under an assumed name does not permit a Supreme Court Justice to evade this constitutional prohibition or

permit a lawyer to use the name of a Supreme Court Justice (New York Judiciary Law, Section 476; New York Penal Law, Section 440).

So at the very outset of his judicial career, appellant wrongfully sought to have his brother continue in the practice of the law under the firm name of Friedman & Friedman.

The next thing appellant did was to take all the financial records, past as well as current, from the Friedman & Friedman law office to his Supreme Court Chambers where he kept control and supervision over them and over the financial records of M. Malcolm Friedman's subsequent practice of the law and the financial records of their liquidation (R. pp. 659a, 691a-694a). Then, on appellant's orders, all the financial statements of M. Malcolm Friedman's subsequent practice of the law and of their liquidation account were delivered unopened to appellant at his Supreme Court Chambers (R. pp. 739a, 815a-817a). The accountant who made the entries in the books, including those of Malcolm Friedman's law business had to do so in appellant's Supreme Court Chambers and the accountant had to leave all of his work papers in appellant's chambers (R. pp. 336a, 742a-743a, 1309a).

Appellant assumed full responsibility for his brother's income tax return and supervised its preparation in his Supreme Court Chambers. Malcolm Friedman, after appellant went on the bench, had nothing to do with the financial records of his own law business or with their liquidation account or with their tax returns. This "chore," as appellant called it, of Malcolm's law business was performed by appellant. He was in complete control. His excuse for taking such control was, that Malcolm couldn't read the books if he stood on his head and since this was only a matter between himself and his brother who would know about it (R. pp. 1311a-1315a).

Early in 1961 disciplinary proceedings were brought against M. Malcolm Friedman and he has been suspended from the practice of law (*Matter of Friedman*, 17 A. D. 2d 644). Two of the four reasons for his suspension stem directly from appellant's involvement in and control over the financial records and affairs of Malcolm Friedman's practice of the law.

It is against this background that the detailed evidence supporting the charges must be viewed.

The First Charge.

The first charge was that appellant interfered with and obstructed a Judicial Inquiry into the conduct of attorneys ordered by the Appellate Division, Second Department.

On November 18, 1957, the Judicial Inquiry subpoenaed the financial records of Friedman & Friedman and M. Malcolm Friedman for the period January 1, 1953 to December 31, 1956 (Exh. 235). From that date until after disciplinary proceedings were brought against Malcolm, appellant made maneuver after maneuver to keep the financial records from the Judicial Inquiry. The chronology speaks for itself.

November 18, 1957-December 11, 1957

When Malcolm asked appellant for the books because he had to bring them to the Judicial Inquiry, appellant told him: "If you take those books in, everybody in this courtroom is going to start sticking his nose into what I got. * * * adjourn it for a couple of weeks and I will get hold of Judge Arkwright [the Justice appointed by the Appellate Division to conduct the Judicial Inquiry] and make arrangements so that they can see it in private" (R. pp. 671a-672a).

Malcolm phoned the Inquiry and asked for an adjournment of the personal and production subpoenas served on him for four or five weeks because appellant had the records in his possession and asked that they be inspected in his Supreme Court Chambers. Malcolm was told that it was the practice of the Inquiry to take subpoenaed records and have an accountant examine them but was granted a three week adjournment of the return of the subpoenas (R. pp. 475a-477a, 824a).

December 11, 1957

Malcolm sent an attorney who worked for him to get another adjournment which was granted to December 17 (R. pp. 825a, 929a-932a).

December 12, 1957

Appellant went to a Judges' dinner with Justice Arkwright.

And, here we have a direct conflict in the testimony as to what one said to the other in respect of Malcolm's subpoenas.

Appellant testified that before going to the dinner he told Justice Arkwright about the subpoenas, about his concern that everybody in the courthouse could know all about his private affairs and asked if something couldn't be worked out so the Inquiry's accountant could examine the books in appellant's chambers; that Justice Arkwright said: "We'll see"; that on the way home from the dinner he asked Justice Arkwright what Malcolm should do about the subpoenas and was told "we will work out an adjournment" and that he then told Judge Arkwright "all I want is a week and then I can work out a way with you" (R. pp. 673a-675a).

Justice Arkwright testified that he did not talk with appellant about Malcolm before going to dinner; that

on the way back appellant told him that Malcolm was to appear before him and asked "what do you want him to say"; and that he told appellant: "Whatever is the truth." Justice Arkwright also testified that he reported that conversation to Mr. Hurley, counsel to the Inquiry, and to the Appellate Division. Justice Arkwright denied that he ever talked with appellant about an adjournment let alone made any promise of one (R. pp. 497a-499a).

December 17, 1957

On appellant's instructions Malcolm appeared at the Judicial Inquiry and asked for an adjournment until some time in February. In doing so, he told Justice Arkwright that he did not have the records called for and that they were in the possession of appellant and under his control and supervision and that he, Malcolm, did not have one of the subpoenaed records which included the financial records of his own law practice and his own income tax returns (R. pp. 932a-933a, 941a-947a, Exh. 235).

In opposing an adjournment, Mr. Hurley said he had talked with Judge Friedman and the Judge had told him that he had the books, that he would not produce them, and that he would only permit an examination of them in his chambers (R. p. 943a).

Judge Arkwright then told Malcolm that the Inquiry had to have the subpoenaed records and that if anyone questioned the Inquiry's right to them the question could be tried out in another tribunal (R. p. 937a).

The Court refused Malcolm's request for an adjournment and Malcolm then testified that Judge Friedman took care of his financial business exclusively. Every record had been submitted to Judge Friedman, including the current books. Malcolm said he didn't even have a book he could check to see if someone had paid a bill

or if the office owed one; that appellant handled all the financial affairs of his (Malcolm's) office, and that he did not think that appellant was going to release the record to him (R. pp. 941a-957a).

When appellant testified before the Court on the Judiciary he admitted that *he* had decided not to deliver Malcolm's books to the Judicial Inquiry and that although he could have done so, he did not deliver them and then (as Judge Arkwright had suggested), raise the question of the Inquiry's right to custody (R. pp. 1264a-1266a).

At the disciplinary proceeding involving his brother, which is part of the stipulated record here, appellant was asked this question: "You never—in November or December 1957, the books never got over to the court?" And he gave this answer:

> "If those books ever got to the court it would have meant my fighting a couple of court officers who would physically take them away from me and I didn't intend to be put in that position, because all Judge Arkwright had to do is say, 'I hereby impound them,' and I would never have had them back" (R. p. 768a).

In short, appellant knew from the very beginning that he had no right, superior to the right of the Inquiry, to the possession of Malcolm's financial records.

If appellant had any doubt that the Inquiry could demand that he give up Malcolm's books it should have been disspelled when late in December, 1957, he went to see Justices Nolan and Murray of the Appellate Division and was told that the Judicial Inquiry was under the jurisdiction of Justice Arkwright (R. pp. 1267a-1268a).

January 8, 1958

The following article appeared in a gossip column of a newspaper:

> "A sitting jurist may be embarrassed by recv'g a call to appear before the Arkwright ambulance inquiry in B'klyn" (Exh. PPPPP).

After that, appellant (so he testified) got mad and told Malcolm he had better get a lawyer and suggested and made an appointment with Colonel Dykman, who was retained by Malcolm on January 10, 1958 (R. pp. 679a-681a).

Appellant testified to his attitude at that time:

> "Q. Now, Judge, isn't it fair to say—isn't it fair to say that if your brother Malcolm had his financial records, the financial records of his own practice from October 7, 1955, up to November, 1957, when we sought them, if he had his own records, there would have been no problem with you at all, would there? A. *Perhaps not, but whether you charge it to my pigheadedness or not, I felt I had a right to keep the records* and not surrender them, and when Colonel Dykman asked me for them the first time I wouldn't give it to him and *the only way my brother could have gotten them from me is sue me in a replevin action* and I don't think he would have gone that far. I was stubborn about them and I was stubborn against—I felt rights were being invaded which you had no right to invade" (R. p. 769a).

Although Colonel Dykman thereafter offered to make a room in his office available for the inspection of the records by the accountants for the Judicial Inquiry, it is to be noted (1) that there was no indication at that time that all books were not available (2) that the sole point then made was appellant had the subpoenaed records including Malcolm's own and was not going to turn them over to Malcolm so he could honor the subpoena,

and that appellant was aware because he was told why it was not feasible to examine the books in his Supreme Court Chambers (R. pp. 681a-685a, 798a, 516a-514a, 939a-943a). Colonel Dykman was also told that it could not be done that way—the records had to be checked against other records (R. pp. 594a-595a, 626a-634a, 958a-959a).

January 28, 1958

Another personal subpoena and a *duces tecum* subpoena calling for the production of his records and records for Friedman and Friedman for 1/1/53 through 1/31/56 were served on Malcolm (Exh. 236, R. pp. 461a, 1266a).

February 4, 1958

The return day of the January 28th subpoena, an employee of Malcolm's appeared and asked for an adjournment because Mr. Kiendl had been retained and he was tied up in another matter and an adjournment was granted (R. pp. 961a-963a).

February 18, 1958

The adjourned day, the same employee asked for a further adjournment because Mr. Kiendl was still on trial, and it was granted (R. pp. 964a-965a).

March 4, 1958

The new adjourned day, a further adjournment was granted to April 28, 1958, because of a stay in a show cause order of the Appellate Division why a similar subpoena in another matter involving another attorney should not be quashed (R. pp. 598a-599a, 635a).

April 28, 1958

Return of the subpoenas was again adjourned, this time without date on Colonel Dykman's statement that Malcolm was ill (R. pp. 966a-967a, 601a).

May 28, 1958

Counsel for the Inquiry wrote to Malcolm saying that Judge Arkwright had directed that he appear and produce his records on June 5, 1958, pursuant to previously served subpoenas.

June 5, 1958

Malcolm and his counsel, Colonel Dykman, told the Inquiry that they could not produce the books because they were in Judge Friedman's possession and he "just would not relinquish them." Speaking of his client, Malcolm, Colonel Dykman said: "He is helpless and what he has said to you, confirmed my statement that possession has been refused" (R. pp. 967a-977a).

Malcolm then testified: when he wanted money, a record was given to appellant and then a check was drawn; he signed anything appellant gave him to sign. Appellant had refused to give him even the books which related to his own practice of the law after appellant went on the bench. Appellant had said "I won't give them to you" (R. pp. 979a, 982a-983a, 988a).

June 16, 1958

Mr. Hurley, counsel for the Inquiry wrote to appellant requesting that he produce the financial records pertaining to Malcolm's law practice after appellant went on the bench, i. e., from October 7, 1955 to December 31, 1957 (Exh. 238).

June 19, 1958

Appellant answered Mr. Hurley's letter saying he would take the matter up with Colonel Dykman when the Colonel returned in July from a trip and he would then be in touch with Mr. Hurley again (Exh. 239).

September 3, 1958

A subpoena for the production on September 29, 1958, before the Judicial Inquiry of Malcolm's records from October 7, 1955 to December 31, 1957, was served on appellant, and thereafter he retained his own counsel to oppose the subpoena for the production of Malcolm's books (R. pp. 697a-698a, 1271a-1272a, Exh. 241).

September 17, 1958

Appellant's attorney appeared before the Judicial Inquiry and a question arose as to the propriety of his appearance for appellant (R. pp. 991a-997a, 1272a).

September 25, 1958

The counsel appellant had retained told him he could not appear for him (R. p. 993a).

September 29, 1958

Appellant had been subpoenaed on September 3rd to appear on this day September 29th before the Justice conducting the Inquiry and to produce Malcolm's records *and he did not do so.* Instead, the attorney appellant had retained appeared and withdrew his appearance. Thereafter, on the same day, another subpoena for Malcolm's records was served on appellant since he had ignored and failed to comply with the September 3rd subpoenas (R. pp. 991a-997a, 1272a-1237a, Exh. 242).

October 15, 1958

This was the return date of the September 29 subpoenas and again appellant did not obey them. Instead, he sent Mr. Harold Fisher for the limited purpose of requesting an adjournment which was granted (R. pp. 997a-998a).

October 21, 1958

Mr. Fisher again appeared before the Judicial Inquiry on behalf of Judge Friedman and asked for an adjournment of the subpoenas served on several banks. An adjournment was granted to October 28, 1958, the date to which the subpoenas served on Judge Friedman had been adjourned (R. pp. 999a-1015a).

October 28, 1958

An attorney from Mr. Fisher's office appeared and asked for an adjournment on behalf of Judge Friedman because Mr. Fisher had a cold. It was granted to November 12, 1958, although there is no evidence that appellant could not produce Malcolm's books (R. pp. 1015a-1019a).

Malcolm also had been subpoenaed to appear and produce his books on the same day (R. p. 1028a). He appeared with counsel who asked for an adjournment for Malcolm because Mr. Fisher had a cold and the two proceedings were tied together. He said:

> "I have just come from Judge Friedman. The information called for Mr. Malcolm Friedman's papers, *those papers are in the possession of Judge Friedman.* Judge Friedman's attitude is that as long as he is under subpoena for them he must bring them."

Thereupon, the Court told Malcolm's counsel:

> "I can't see, Colonel, how the two are interrelated at all. If the only obstacle is that the Judge wants to be released from that subpoena, I will release him, but we certainly can't put up with this situation where we are just battered from one to the other. It has gone on long enough. It will have to come to an end. I think we will proceed with the examination of Mr. Malcolm Friedman now" (R. pp. 1020a-1023a).

Malcolm testified: Judge Friedman has the records and will not produce them or give them to him to produce. The Court directed Malcolm to produce the records on November 12, 1958 (R. pp. 1028a-1037a).

November 8, 1958

Malcolm got a Justice of the Appellate Division to sign a show cause order as to why the subpoenas directed to him should not be quashed, which contained a stay of all proceedings in connection with or relating to his "family." It is to be noted that appellant made no motion to quash the subpoenas served upon him (R. pp. 1039a-1040a, Exh. 287).

November 12, 1958

This was the date to which the subpoenas for appellant's production of the records had been adjourned because of Mr. Fisher's cold. Mr. Fisher appeared and said that he had intended to move as to the subpoenas directed to Judge Friedman but had not done so because of the stay obtained by Malcolm—i. e., because the stay covered Malcolm's "family." All matters were adjourned on the basis of that stay until December 15, 1958 (R. pp. 1038a-1044a).

December 15, 1958

The Appellate Division had not decided Malcolm's motion to quash the subpoenas served on him so all matters were again adjourned to January 15, 1959 (R. pp. 1044a-1048a).

From January 15, 1959 to February 18, 1959, all matters were adjourned to give the new Justice assigned to conduct the Inquiry, Justice Baker, an opportunity to study what had been done (R. p. 1049a).

February 18, 1959

By this time the Appellate Division had denied Malcolm's motion. But, an adjournment was asked on behalf of appellant because of his counsel's, Mr. Fisher's legislative duties as member of the staff of a minority leader. The adjournment was consented to and granted *to March 6, 1959, on the assurances* of Mr. Fisher and from his client Judge Friedman that on that date the financial records of Malcolm would be turned over to the Inquiry if the subpoenas to Judge Friedman were withdrawn (R. pp. 1049a-1053a).

March 2, 1959

On behalf of appellant, Mr. Fisher produced *some* of Malcolm's books but not the bank statements and cancelled checks for his regular account, his special account and his office account. Nevertheless, Malcolm's counsel stated that so far as Malcolm was concerned everything there was to produce, was produced. And, on Mr. Fisher's assurance that Judge Friedman would testify voluntarily the subpoenas directed to him were withdrawn (R. pp. 1053a-1070a).

March 19, 1959

Mr. Hurley wrote to Mr. Fisher asking for Malcolm's missing records because the accountant had to have them in order to make an intelligent examination of the books that had been produced (R. pp. 1089a-1090a).

May 14, 1959

The Justice conducting the Inquiry was asked by its counsel to direct the banks to comply with the subpoenas for the Friedman records. Mr. Fisher, on behalf of Judge Friedman, objected on the ground that the Judge had not had his day in court as to those subpoenas. Attention is called to the fact that those were the sub-

poenas involved on Malcolm's motion to quash which the Appellate Division had already sustained and had held that the banks had to produce the records. In short, by this manoeuver, Judge Friedman challenged the Appellate Division's order denying the motion to quash the subpoenas to the banks on the untenable basis that he was not a party to the motion. The court directed the banks to comply, but sealed the records for 10 days to give Mr. Fisher an opportunity to make a motion in respect of them (R. pp. 1072a-1088a).

On that same day, May 14, 1959, Mr. Fisher was called upon to produce the rest of Malcolm's records as requested in the March 19, 1959, letter.

The Court explained to Mr. Fisher:

> "We found when we looked at the records that there were others which we must have in order to make head or tail out of those which were left" (R. pp. 1089a-1091a).

Mr. Fisher then produced employee records (R. pp. 1092a-1093a) and said:

> "*With respect to Item 1 in that letter, the canceled vouchers and bank statements for the regular, special and office accounts, my client's last month's judicial duties prevented him from looking for them* I hope judicial duties will be a little lighter in the immediate future and we will look for them."
>
> • • • • • •
>
> "If we decide not to make any application, we will certainly produce them in the next couple of weeks as soon as we can look for them" (R. p. 1094a).

The Court said:

> "Can't we fix some reasonable limit of time? I might say for the record that the Judge himself spoke with me about that and said that the records

were scattered, that he had had no opportunity to look for them, that finding them would be a very difficult task. He told me that two or three times."

"*I have a recollection that he suggested to me*, and I may not be accurate, *that it might take him all summer to locate the records and get them together*" (R. pp. 1094a-1095a).

Mr. Hurley said:

"We had a talk on the telephone not long ago and I said to Mr. Fisher, 'I think you are giving us a runaround,' and he said, 'That may be. That may be.' I think that is what we are confronted with here. I regret very much now that the subpoena *duces tecum* was withdrawn last time, otherwise I could ask your Honor now to direct that these papers be produced and I would have to subpoena Judge Friedman again in order to ask your Honor for such a direction" (R. p. 1096a).

Appellant admitted that although he had all the records, he did not even "start actually getting them together or looking to see" what he really had "until after Judge Baker had taken charge of the Inquiry" (R. p. 779a), i. e., fourteen months after the records were subpoenaed.

June 16 1959 (over a month later)

Mr. Hurley wrote to Mr. Fisher saying that the Inquiry had not yet received Malcolm's bank statements and cancelled checks for the period October 7, 1955 to December 31, 1957, and that without them the records delivered were of little value. He also asked for Malcolm's income tax returns which had been subpoenaed but not produced. And, he told Mr. Fisher that Judge Baker had put the matter on for June 24, 1959, and requested that, if the records were not produced, Judge Friedman come in and testify (R. pp. 1111a-1112a).

June 16,—June 24, 1959

Judge Friedman told Judge Baker that he would not produce any of the records. According to Judge Baker, "He (Judge Friedman) took the position that the records of Malcolm Friedman might reflect some of the affairs of Friedman & Friedman and felt that he should adhere to his position which was that he would not produce any of the records, and that we could take whatever steps we chose to compel their production, and he would oppose those steps," and indicated that *"if he were subpoenaed" he would vacate it* (R. pp. 1112a-1113a, 1123a).

Judge Baker testified:

> "Q. First, did he (Judge Friedman) suggest that you should so order the subpoena? A. Yes.
> "Q. And then it was that he said that if you did that, and the subpoena was issued to him, he would vacate the subpoena? A. Yes" (R. p. 552a).

June 24, 1959

Judge Baker "so ordered" new subpoenas to be served on Judge Friedman for the production of specified records of M. Malcolm Friedman and Friedman and Friedman for the period January 1, 1953 to December 31, 1958 (Exh. 245, R. p. 1284a).

Appellant seeks to give this Court the impression that Judge Baker would have gone along with an examination of Malcolm's books at any convenient place (Jurisdictional Statement, pp. 8-9). The fact is that Judge Baker ordered the subpoenas issued to Judge Friedman to produce the books at the Additional Special Term conducting the Judicial Inquiry. He did this because Judge Friedman had told him that he would not honor a subpoena unless Judge Baker personally ordered it to be issued.

July 3, 1959

Subpoenas ordered by Judge Baker on June 24 returnable September 9, 1959, were served on Judge Friedman. In other words, appellant was again given all summer to gather the subpoenaed records.

September 30, 1959

After consent adjournments of the return of the subpoenas from September 9th, Mr. Fisher acting on behalf of appellant produced Malcolm's tax returns for 1956 and 1957 but not for 1953, 1954, 1955, as subpoenaed, and said he would deliver the canceled checks and bank statements on October 14, 1959. He then stated:

> "Well, *Judge Louis Friedman* most respectfully and without meaning any offense, *has and will decline the invitation contained in the subpoena directed to him personally,* • • • on the ground that it is our belief that this Inquiry has no jurisdiction over him personally, in view of his position as a Justice of the Supreme Court. • • •
>
> "With respect to the subpoena *duces tecum* • • • dated June 24, 1959 • • • in reference to matters and books and records which concern themselves with my client, that for the same grounds and for the same reasons, *the invitation therein contained is respectfully declined*" (R. pp. 1124a-1135a).

October 13, 1959

Mr. Fisher offered from the possession of his client Justice Friedman some of, but not all, the subpoenaed bank statements and canceled checks of Malcolm Friedman and then said: "*These are all the checks, canceled checks and statements that my client has been able to locate to this point*" (R. pp. 1179a-1180a). Attention is called to the fact that statements and checks then produced as well as those not produced had been subpoenaed twenty-

three months before (Exh. 235) and that that subpoena called for all canceled checks and bank statements for the period January 1, 1953 to December 31, 1956.

December 14, 1959

Judge Baker rendered a decision on appellant's September 30th objection to his jurisdiction, holding that appellant had to honor the subpoenas (Exh. 265). The decision read in part: "Respondent (appellant here), has been subpoenaed as an ordinary witness. He must obey the mandate of this Court. A Supreme Court Justice has no constitutional or statutory immunity from being subpoenaed *as a mere witness with respect to facts within his knowledge concerning the conduct of others or concerning the financial records of another which are in his possession.*"

December 18, 1959

Appellant was ordered by Judge Baker to comply with the subpoenas on January 15, 1960 (Exh. 265).

January 15, 1960

The matter was adjourned over objection to *January 22* (R. pp. 1181a-1183a).

January 22, 1960

Mr. Fisher offered to produce some Friedman & Friedman books if the subpoenas and the Court's decision and order were withdrawn *and for the first time the Judicial Inquiry was told that as to the dates prior to January 1, 1955*:

> "*There were no books, there might have been checkbooks and cancelled checks which we don't have, but that we probably have the tax returns for the years 1953 and 1954,* and that if we have them we will give them to you—if we don't have them, we will get photostatic copies from the Government" (R. p. 1185a).

Mr. Fisher again made a conditional offer to produce other records if the subpoenas issued to appellant were withdrawn. The matter was adjourned to January 27, 1960 (R. pp. 1185a-1192a).

January 27, 1960

The Court accepted Mr. Fisher's conditional offer of January 22nd to produce the records if the subpoenas issued to appellant were withdrawn (R. pp. 1193a-1194a).

February 9, 1960

Appellant caused to be surrendered to the Inquiry some of the Friedman & Friedman books for 1955 and some of the liquidation account books for 1955, 1956 and 1957 (R. p. 1294a).

March 14, 1960

Appellant surrendered some bank statements and vouchers for these accounts (R. pp. 1295a-1296a, Exh. 246).

May 9, 1960

Mr. Hurley wrote to Mr. Fisher reviewing the piecemeal delivery of some of the subpoenaed records, enclosing a long list of missing records, emphasizing that prompt delivery of the missing records was imperative and offering to afford Judge Friedman an opportunity to explain why the records had not been produced. A copy of the letter was sent to Malcolm Friedman with the request that, if his income tax returns were not available, he sign an enclosed form so that they could be obtained from the Federal Government (R. pp. 1296a-1297a, 1209a-1214a).

May 27, 1960

Malcolm testified that he had no records and that he would "think" about signing an authorization to allow the Inquiry to get his Federal returns from the Government (R. 1209a-1214a).

June 3, 1960

Malcolm declined to sign an authorization for the Inquiry to get his Federal returns from the Government (R. p. 1238a).

On the hearing before the Court on the Judiciary, appellant testified that he had the records at the time and assumed full responsibility for them but said he knew nothing about Malcolm's refusal to sign the authorization until afterwards and did not counsel him to refuse the authorization (R. pp. 1292a-1303a, 1330a). However, on Malcolm's disciplinary proceeding, which is a part of this record, he testified that he *knew about the request for the authorization* but that *he saw no reason to open up more investigations* (R. pp. 750a-751a).

In other words, appellant lied in one court or the other about Malcolm's refusal to sign the authorization. The Inquiry was never able to obtain Malcolm's income tax returns for 1953 and 1954 which appellant admittedly had prepared and at one time, if not always, had copies, because Malcolm acting at the direction of appellant refused to sign the necessary authorization.

March 21, 1961

After the disciplinary proceedings were started against Malcolm, appellant unofficially delivered to Mr. McCoy, of the Judicial Conference of the State of New York, some more records called for by several subpoenas (R. pp. 1298a-1299a). However, as appellant admitted, the 1953 and 1954 records which he kept and which were called for by the 1957 subpoena issued to Malcolm were still missing as were some of the records for 1955, 1956, 1957 (R. pp. 1299a-1300a).

The foregoing facts show beyond any doubt that appellant, directly and/or indirectly (through his brother whom he counselled in his appearances*) interfered with and delayed the Judicial Inquiry ordered by the Appellate Division of the Supreme Court of the State of New York.

In the proceeding involving his brother, appellant admitted that a Supreme Court Justice who has evidence to give and who is requested to come in and give it should do so like any citizen and that he should not wait for a subpoena (R. pp. 764a-765a). Thus, by his own admissions he violated the standards of judicial conduct.

Solely as a result of his acts in violation of the canons of judicial ethics appellant caused his brother to violate the canons of professional ethics for which his brother is now being disciplined (*Matter of Friedman*, 17 A. D. 2d 644).

These facts, the accuracy of which cannot be questioned, demonstrate that appellant's retention in office was inconsistent with fair and proper administration of justice. How can justice be fairly and properly administered and the confidence of the people therein be maintained if it continues to be administered by one who deliberately delays, ignores, obstructs, flouts, impedes and threatens to prevent the administration of justice and counsels and forces another to do likewise.

Appellant was properly removed from office on the first charge alone.

And, if this Court has any doubt about this, we submit that the flimsy, inconsistent, pettifogging, trivial, dishon-

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* Appellant testified:
"[6611] Q. Just tell me: Did you talk over with your brother, Malcolm, his various appearances at the Judicial Inquiry? A. Yes.
"Q. Both before he appeared and after he appeared? A. I don't know about before each time, but I certainly talked to him about it afterward" (R. p. 744a).

est and childish excuses appellant made and continues to make for his conduct and his claim that he did nothing wrong demonstrate conclusively his lack of fitness for judicial office. Appellant would excuse his conduct on the ground that his privacy was being threatened.

Query: How was appellant's privacy threatened by a subpoena for Malcolm's records alone? Appellant would also excuse his conduct on the ground that the over three-year delay in producing such books as were produced—about 60 percentage of those subpoenaed—was because he was waiting for a ruling. Query: Why should a New York Supreme Court Justice need an elementary ruling? How many such rulings did he need? Why did he not get one promptly by producing the books and then testing, by the normal judicial process, his so-called right to keep them as against the demands of their rightful owner, his brother, and the subpoenas of the Judicial Inquiry? Why did he need *any* ruling in the face of his admission that his brother could have obtained the records in a replevin action?

The Second Charge.

The second charge was that appellant abused his office by maintaining in his chambers exclusive control over Malcolm's financial records without properly preserving or accounting therefor and by refusing to let Malcolm have them so that he could obey proper subpoenas for them.

Before appellant went on the bench he personally kept all the financial records of the Friedman & Friedman law business, except an office account for small disbursements, kept by Miss Silver, his secretary, and he prepared all income tax returns (R. pp. 652a-653a). It was not until

a few months before he was appointed to the bench that an accountant was engaged to write up the books once a month (R. p. 658a).

When appellant went on the bench he took all the financial records, *past*, as well as current with him and continued to keep and supervise, in his Supreme Court Chambers, the write-up of all the financial records of his brother's law practice (R. pp. 656a-657a, 659a, 691a-693a). All the financial statements and canceled checks were delivered unopened to him in his Supreme Court Chambers for the accounts of M. Malcolm Friedman, the M. Malcolm Friedman Special Account, the M. Malcolm Friedman regular account and the Friedman & Friedman liquidation account. The accountant had to write up all the books in appellant's chambers and from what he submitted to him (R. pp. 336a-354a, 659a-692a, 833a-835a, 841a, 850a-851a, 932a, 941a-946a, 979a). Malcolm had nothing to do with the books. He didn't know of what they consisted. He did not even know how much money he earned in a given year.

As has been pointed out above when Malcolm received a subpoena from the Judicial Inquiry for production of his books appellant refused to give them to him (R. p. 934a).

As has also been pointed out above when appellant continued from November, 1957, to September, 1958, to refuse to turn over to Malcolm his own books which the Judicial Inquiry had subpoenaed, a subpoena for Malcolm's books was served on appellant and, from that time on until February 18, 1959, appellant successfully avoided complying with that subpoena by the adjournment route and on the basis of a motion by Malcolm in the Appellate Division to quash the subpoena issued to him (Exhs. 235, 236, 238, 239, 241, 242, 287, R. pp. 671a, 681a, 697a-698a, 932a-934a, 956a, 967a-977a, 982a-983a, 988a, 997a, 999a-1015a, 1015a-1019a, 1021a, 1038a-1048a, 1271a-1273a).

On February 18, 1959, after the Appellate Division had denied Malcolm's motion, appellant assured the Judicial Inquiry that if the subpoenas as to him were withdrawn he would turn over to it Malcolm's financial records (R. pp. 1049a-1053a). Upon the withdrawal of the subpoenas, appellant turned over to the Inquiry on March 2, 1959, only some of Malcolm's records (R. pp. 1053a-1070a, 1276a). This was 16 months after they were first subpoenaed. Moreover, the records which were then surrendered were so incomplete as to be unintelligible (R. pp. 1089a-1090a). When a demand was made for other records belonging to Malcolm appellant ignored his commitment to the Court and took advantage of the withdrawal of the subpoenas as to him, first, by stalling for time and, then, by refusing to produce them (R. pp. 1072a-1123a). As a consequence, new subpoenas were ordered to be served on him on June 24, 1959 (R. p. 1284a, Exh. 245).

Although the new subpoenas were not returnable until September 9, 1959, appellant did not deliver any more of Malcolm's records until October 13, 1959. Meanwhile, he had informed the Inquiry that he would not obey the personal subpoena or the *duces tecum* one for the production of the related records of the Friedman & Friedman liquidation account (R. pp. 552a, 1134a-1139a).

By making a wholly frivolous and technical objection to the jurisdiction of the Judicial Inquiry, appellant kept possession of the other subpoenaed records until February and March, 1960, when he allowed some other records to be submitted (Exh. 265, R. pp. 1134a-1135a). And, this again was only after acceptance by the Court of his demand that the subpoenas served on him be withdrawn, i. e., he again gave his word as a Supreme Court Justice that he would do voluntarily that which he knew the law required him to do. And, again, the Court conducting the Judicial Inquiry took the word of a Supreme Court Justice (R. pp. 1181a-1194a, 1294a-1296a).

On May 9, 1960, another demand was made upon appellant for other records belonging to Malcolm. Acting as directed by appellant, Malcolm refused to authorize the Inquiry to get his tax returns from the Federal Government (R. pp. 1238a, 1292a-1303a, 1330a, 750a-751a, 774a).

As has also been pointed out, the final delivery by appellant of the subpoenaed records was not made until March 21, 1961, after the disciplinary proceedings against Malcolm were started and this left 40% not produced (R. pp. 1298a-1300a).

Although appellant continually maintained from 1957 on that he had the subpoenaed records and that it was only his so-called right of privacy which prevented him from turning them over, it was not until January 22, 1960, that the Inquiry was informed that there were no records for 1953 and 1954 (R. pp. 1185a).

The brashness of appellant's retention of Malcolm's records is matched only by his threat to act as a Supreme Court Judge and vacate any subpoena served on him and by his demand that the Inquiry come to his Supreme Court Chambers if they wanted to look at Malcolm's books.

As shown above all during the time the Inquiry was trying to get Malcolm's books, Malcolm was protesting, after consulting with appellant, that he could not obey the subpoenas to him because appellant had the records and would not give them to him. Appellant, although he kept all the financial records, gave Malcolm no accounting. Malcolm simply signed checks and income tax returns when asked to do so. Malcolm had no knowledge of what his financial records consisted—he didn't even have a copy of his income tax returns—he didn't even know how much money he made—he couldn't even look at a book in his office to see if a bill owed or owing had been paid. The accountant had no check on what went into the liquida-

tion account and what went into Malcolm's regular account. The secretary, Miss Silver, who kept the office account for small disbursements, would only keep the records for a year and then she threw them out. She testified that, although she had charge of the office account, she did not have the office account records of disbursements for 1953 through 1957 and she was never told not to destroy them (R. pp. 932a-946a, 968a-988a, 816a-817a, 336a-354a, 368a).

Appellant claims that he threw out the financial records for 1953 and 1954 after the tax returns had been audited but there is a conflict in his testimony as to when the audit occurred and when he claims he threw out the records (R. pp. 714a-715a, 727a-728a, 746a-747a, 919a-921a, 1244a, 1290a-1291a). But regardless of that conflict the fact most favorable to appellant is that he, so he says, deliberately destroyed the 1954 records within less than a year and a half after the returns were filed.

Appellant's testimony as to the missing 1953 and 1954 records was incredible and the Courts in the Malcolm Friedman disciplinary proceeding so found.

Further, until 1960 appellant hid the fact that the records did not exist (R. p. 1185a).

Appellant knew or should have known that there is no finality to a tax audit (R. p. 1292a).

Moreover, lawyers don't throw away financial records after keeping them for only a year and a few months.

As shown above appellant counselled Malcolm not to authorize the procurement of his 1953 and 1954 income tax returns.

In handling Malcolm's records appellant, as he testified, thought it was something that was between himself and Malcolm and that nobody would know about it so he saw nothing improper in his conduct (R. p. 1315a).

Appellant, in the manner in which he handled, retained and destroyed Malcolm's books, put Malcolm in a position in which he could not fulfill his duty as an attorney, and for that he is now being disciplined.

In undertaking exclusive control of the financial affairs of Malcolm's law practice from his Supreme Court chambers appellant abused his public office.

The evidence overwhelmingly establishes the second charge preferred against appellant and he was properly removed from office on that ground alone.

The Third Charge.

The third charge was that appellant abused his office by violating and failing to observe the canons of Judicial Ethics and by causing his brother to violate and fail to observe the canons of professional ethics.

Under this charge there are two specifications: one, as to appellant's assumption of the role of a lawyer (the Shevack case); the other, as to his having failed to report fully his brother's income, for which failure his brother is now being disciplined.

The Shevack Case.

A little over a month after appellant became a Justice of the New York Supreme Court he was visited at his home by a man named Schneider who told him that his grandson had been injured as a result of having been hit by a car (R. pp. 267a-268a).

Schneider also told appellant: That his estranged son-in-law had retained a lawyer; that the lawyer had informed him that the driver of the car was uninsured; that appellant's brother represented the uninsured driver; that the lawyer had told him that he could collect under his own insurance policy, and that his insurance coverage was by Fidelity & Casualty Co., and he showed appellant his policy. Schneider asked appellant to help him and appellant said he would see what he could do (R. pp. 216a-221a, 268a-269a).

The next day appellant, after he returned from the courtroom to his chambers, telephoned Mr. Herd, the President of the America Fore Group of Insurance Companies, which included Fidelity and Casualty Co., and said he wanted to ask him a question about the uninsured motorist coverage (R. pp. 99a-100a, 269a).

This was coverage which the insurance companies had voluntarily assumed only a short time earlier to discourage the enactment by the New York Legislature of compulsory insurance legislation. By it a policyholder or a member of his family living with him is covered for damages caused by the negligence of an uninsured driver (R. pp. 8a-10a, 62a).

The secretary of the company, Mr. Lusby, was with Mr. Herd at the time, and, since Mr. Lusby knew more about that coverage, Mr. Herd turned the phone over to him (R. pp. 99a-100a, 107a-110a, 269a).

The testimony of Mr. Lusby and appellant is contradictory as to the conversation that followed. Mr. Lusby testified that appellant said that he had a question regarding coverage on which he would like his opinion on a factual situation; *that the case did not involve his company,* i. e., one of the *America Fore Group* so he, Lusby, could talk freely. Mr. Lusby also testified that appellant

did not tell him that Malcolm represented the uninsured driver (R. pp. 108a-109a, 128a, 123a). Appellant, on the other hand, testified that he told Mr. Lusby that his company had issued the policy involved and that Malcolm represented the uninsured driver (R. p. 270a). On this point of credibility we submit that the Court on the Judiciary could properly accept Mr. Lusby's disinterested version and not appellant's.

We further submit that appellant's conduct in calling the President of the America Fore about a private claim and in saying what Mr. Lusby testified he said constituted an abuse of his judicial office.

Prior to appellant's telephone call to Mr. Herd the Fidelity and Casualty Company had received a letter from a Mr. Palmer, the lawyer retained by the father of the injured child, notifying it of the claim under the uninsured motorist provision of the grandfather's insurance policy (R. pp. 16a-18a, 30a, Exh. 7). On the day appellant called the president of the insurance company there was written on this letter a note that the President, Mr. Herd, had received a call from Judge Friedman about the case (R. pp. 28a-30a). The company assigned a Mr. Gardner to investigate the case and he made two reports which are exhibits in this case (Exhs. 23 and 24). The day after appellant's call to Mr. Herd, Mr. Gardner visited the assured, Mr. Schneider, and found that there was considerable doubt as to whether the grandson was a member of the grandfather's household or lived in a separate apartment (Exh. 23). During Mr. Gardner's visit the assured, Mr. Schneider, called Judge Friedman and consulted him about a statement Mr. Gardner had asked Schneider to sign (Exh. 23). Mr. Gardner then talked on the phone to Judge Friedman about the statement and Judge Friedman insisted that the statement be given to the assured for delivery to him, Judge Friedman, before

it was reported to the office (Exh. 23). At that time appellant told Gardner that he was not pleased with Mr. Palmer being in the case (Exh. 23).

Appellant testified to having talked to Mr. Gardner on the phone and to having told him to give the statement to Schneider so appellant could see it and decide if it was all right (R. p. 271a). Appellant also testified to having told Mr. Gardner to take the claim form to Miss Silver in his brother, Malcolm's, office and that he, appellant, would give her the information, i. e., tell her how to fill out the claim form (R. pp. 271a-272a). All of which was done in accordance with appellant's directions (R. p. 272a). Appellant, after seeing the statement, advised Schneider that it was all right and to sign it (R. p. 272a). The forms were delivered to and returned by Miss Silver (R. pp. 272a, 255a, 258a).

About a week after Mr. Gardner visited Mr. Schneider, he was in Schneider's drugstore making a purchase and Schneider told him he did not know what to do—that Judge Friedman wanted him to sign an affidavit withdrawing Palmer from the case and that he, Schneider, did not want Palmer withdrawn because it would widen the rift between his daughter and his son-in-law, but that Judge Friedman was adamant (Exh. 24, R. pp. 183a-190a).

Mr. Madigan, the Claims Manager for America Fore, testified that Mr. Schneider's statement was received in a Friedman & Friedman envelope (R. pp. 32a-34a, Exh. 8). Miss Silver testified that Judge Friedman gave her some information on this matter and that she filled out the forms and sent them in with some letters on Malcolm's letterhead (R. pp. 255a-258a, Exhs. 8, 9, 10, 11, 12, 13, 19). From the forms and the letters it is clear that they were the product of Judge Friedman as was conceded (R. pp. 58a, 19a).

About two months after Judge Friedman called Mr. Herd and after he had talked with Mr. Gardner, Miss Silver, the Judge's secretary, called Mr. Madigan, the Claims Manager, and asked him if he was ready to discuss with Judge Friedman the settlement of the child's case and she was told by Mr. Madigan that Mr. Palmer was the attorney for the child's father (R. p. 37a). Two days later, Judge Friedman called Mr. Madigan and told him that Mr. Palmer wasn't in the picture (R. pp. 37a-38a). Whereupon, Judge Friedman was told that Mr. Palmer had a letter in the file and until it was withdrawn he would have to be regarded as the attorney for the child (R. p. 38a). Six months later Judge Friedman again called Mr. Madigan and told him that Mr. Palmer had been removed from the case. When Mr. Madigan asked if he could confirm that by calling Mr. Palmer he was told by Judge Friedman not to call Palmer but to take his, the Judge's, word for it (R. p. 39a). However, during the six months between Judge Friedman's first and second call about Palmer, Madigan had called Palmer and Palmer had then used some explosive language and had said some uncomplimentary things about Judge Friedman and had said that as far as he was concerned he represented the child (R. pp. 40a-45a, 81a-83a). Notwithstanding that appellant had told Mr. Madigan not to call Palmer he did and was told by Palmer: "I'm not off the case and that so and so is not going to put me out" (R. pp. 82a-83a).

Nevertheless, Mr. Madigan called Judge Friedman and discussed the value of the case. Madigan offered $1,500. Appellant got mad. Madigan raised it to $1,800. Appellant said he was too low. Madigan raised it to $2,000. Appellant said he was still too low but would recommend the figure to Mr. Schneider. Two days later Judge Friedman called Mr. Madigan and said that Mr. Schneider wanted $5,000 but that he, Judge Friedman, thought the company ought to pay $3,500. Madigan said no. Judge

Friedman then asked for $3,000. Madigan said $2,500, plus the medical expenses. Judge Friedman said he would recommend that to Mr. Schneider. So the case was settled for $2,500 plus $596 medical expenses, i. e., $3,096, as the result of appellant's negotiation with an insurance company which might have had cases before him (R. pp. 45a-47a, Exh. 5, R. pp. 14a-15a, 663a-664a, 666a). Is it any wonder that the Court on the Judiciary rejected appellant's claim that his role in these negotiations was *simply* that of a mediator.

Mr. Palmer testified that after Madigan's second call he determined to step out of the case. He said:

> "I determined at that time after receiving this call that I might just as well step out of it and forget it, which I did. * * * *I felt that I was a young practicing attorney and I hoped to make a career for myself here and there was just no sense in going ahead with a case where I was going to antagonize a Supreme Court Judge.*"

Appellant's position is that he sees nothing wrong in his negotiation of this claim with the insurance company, a litigant with many cases in the Supreme Court in his district, that this was a perfectly innocent incident, and that by no stretch of the imagination could he be regarded as having been engaged in the practice of law because, as he points out, he received no fee (Jurisdictional Statement, p. 13).

We submit that in negotiating this settlement, in advising Mr. Schneider of his rights and the infant's rights and in supervising the preparation of the necessary papers, appellant engaged in the practice of the law in violation of the prohibitions in the New York State Constitution and the fact that he did not get a fee for it is wholly immaterial, and that the Court on the Judiciary properly held:

> "That said Louis L. Friedman by his actions as to the Shevack claim violated and failed to observe the concept, spirit and letter of the canons of judicial ethics."

and that his conduct constituted an abuse of his office and sufficient cause for his removal from it.

Appellant also abused his office by acts which cause his brother, Malcolm, to be found guilty and disciplined for failure to report income. However, since the Court on the Judiciary made no mention of the evidence in respect thereof, there is no occasion to refer to it here.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

I.

Appellant had no constitutional right to his office.

Contrary to the assertion in the Jurisdictional Statement at page 15, appellant did not have a right under the Constitution of the United States to the office of Justice of the Supreme Court of the State of New York. As this Court said in *Wilson vs. State of North Carolina*, 169 U. S. 586, 593, 596:

> "The only question for us to review is whether the state, through the action of its governor and judiciary, has deprived the plaintiff in error of his property without due process of law, or denied to him the equal protection of the laws.
>
> "We are of the opinion the plaintiff in error was not deprived of any right guaranteed to him by the Federal Constitution, by reason of the proceedings before the governor under the statute above mentioned, and resulting in his suspension from office.

> "The procedure was in accordance with the Constitution and laws of the state. It was taken under a valid statute creating a state office in a constitutional manner, as the state court has held. What kind and how much of a hearing the officer should have before suspension by the governor was a matter for the state legislature to determine, having regard to the Constitution of the state. The procedure provided by a valid state law for the purpose of changing the incumbent of a state office will not in general involve any question for review by this court.
>
> "A law of that kind does but provide for the carrying out and enforcement of a policy of a state with reference to its political and internal administration, and a decision of the state court in regard to its construction and validity will generally be conclusive here. The facts would have to be most rare and exceptional which would give rise in a case of this nature to a Federal question."

citing and quoting from *Allen v. Georgia*, 166 U. S. 138.

We are not dealing here with the barring of a person from public office by a state-imposed criteria forbidden by the Constitution of the United States as in *Torcaso v. Watkins*, 367 U. S. 488, cited by appellant (p. 15). Appellant was not removed because of his belief or lack of belief in religion. Nor are we dealing here with the removal of a person from public office for having invoked the privilege against self-incrimination under the Fifth Amendment as in *Slochower v. Board of Education*, 350 U. S. 551, cited by appellant (p. 15). Appellant was not removed because he invoked a constitutional privilege. And, we are not dealing with the disqualification of a person from public office because of membership in some organization as in *Wieman v. Updegraff*, 344 U. S. 183, cited by appellant (p. 15). Appellant was not removed because he was a member of some organization.

We are dealing only with whether appellant had under the Federal Constitution a right to continue to be a Justice of the Supreme Court of the State of New York despite the conduct of which he was found guilty after notice of the charges in respect thereof and the fullest kind of a hearing thereon. Stated in the language of this Court in the *Slochower* case, *supra* (p. 555), the only possible issue here is whether the terms laid down for appellant's continuance in his office by Section 9a (now Section 22) of Article VI of the New York Constitution were "reasonable, lawful and non-discriminatory."

Certainly this Court is not going to hold that it is unreasonable, unlawful or discriminatory for a State to demand that its judicial officers refrain from abusing their offices (1) by interfering with and obstructing a Judicial Inquiry and Investigation properly ordered by an Appellate Court (2) by engaging in unethical and improper conduct in maintaining in his judicial chambers exclusive custody, control and management of the moneys, accounts, books and financial records of the law firm of which he was a member and of the successor law office without properly preserving or accounting therefor and in refusing to surrender the same on reasonable and proper demands (3) by violating the concept, spirit and letter of the canons of judicial ethics in negotiating the settlement of a claim against an insurance company on behalf of the claimant in the face of a specific prohibition against the practice of law by judicial officers.

Jurisdiction would only exist in this Court in a case such as this one where "there had been; by reason of the statute and the proceedings under it such a plain and substantial departure from the fundamental principles upon which our government is based that it could with truth and propriety be said that if the judgment were

suffered to remain, the party aggrieved would be deprived of his life, liberty or property in violation of the provisions of the Federal Constitution," otherwise this Court would have jurisdiction "to supervise and review the political administration of a state government by its own officials and through its own courts." *Wilson v. State of North Carolina,* 169 U. S. 586, 596.

Even if appellant's removal had been in violation of state law, which we shall show is clearly not so, no substantial federal question would be presented. In *Snowden v. Hughes,* 321 U. S. 1, 7, this Court said:

> "More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. *Taylor & Marshall v. Beckham,* 178 U. S. 548. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion, *Cave v. Newell,* 246 U. S. 650, as we reaffirm it now."

Appellant's right to be a Justice of the Supreme Court of the State of New York is derived solely from State law. In fact, it is derived from the Article of the New York Constitution part of which he here challenges. Appellant took office under and continued therein subject to being removed in accordance with the procedures prescribed by Article VI of the New York State Constitution. (For the information of this Court the history of these procedures is set forth in an appendix to this brief.)

II.

Even if appellant had some right to the office of Justice of the Supreme Court of the State of New York within the protection of the Due Process Clause of the 14th Amendment, the Procedure of Article VI of the New York State Constitution is due process of law and appellant has had it.

Section 22 (formerly Section 9a) of Article VI of the New York Constitution sanctions removal by the Court on the Judiciary of a Justice of the Supreme Court only for cause and after due notice and hearing thereon. Such a hearing is not rendered a fiction by a construction of that section as authorizing the Court on the Judiciary to pass preliminarily on the sufficiency of the facts brought to its attention for the purpose of determining whether cause exists for the preferral of charges. The power of the Court in this respect is the same as the power of the Courts in the disciplining of their officers.

In *Randall v. Brigham*, 7 Wall. 523, 540, this Court said:

> "All that is requisite to their validity is that when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney, of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

In *Ex Parte Wall*, 107 U. S. 265, this Court said:

> "It is contended, indeed, that a summary proceeding against an attorney to exclude him from the practice of his profession on account of acts for which he may be indicted and tried by a jury, is a violation of the 5th Amendment of the Constitution, which forbids the depriving of any per-

son of life, liberty, or property without due process of law. But the action of the Court, in cases within its jurisdiction, is due process of law. It is a regular and lawful method of proceeding, practiced from time immemorial. Conceding that an attorney's calling or profession is his property, within the true sense and meaning of the Constitution, it is certain, that in many cases, at least, he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney.

"We have seen that, in the present case, due notice was given to the petitioner, and a trial and hearing was had before the court, in the manner in which proceedings against attorneys, when the question is whether they should be struck off the roll, are always conducted."

III.

Article VI, Section 22 (formerly Section 9a), of the Constitution of the State of New York does not make the Court on the Judiciary both the accuser and judge in proceedings thereunder.

Under the present Constitution of New York State the primary function of the Court on the Judiciary is to determine on the record presented either by trial or by stipulation whether cause exists for the removal from office of a judge or justice against whom charges of removal have been preferred. Contrary to the assertions made by appellant the New York Constitution does not make the Court on the Judiciary the preferrer and prosecutor of such charges.

In giving the Court on the Judiciary the power to designate an attorney or attorneys at law to act as counsel to conduct the proceedings it was the plain intent of the framers of the New York Constitution and of the

People of New York in approving the provision that the charges should be preferred, i. e., brought as adversary parties as they have been here, by counsel designated to conduct the proceedings.

Such procedure was obviously patterned on the long established and judicially approved procedure in disciplinary proceedings against attorneys who are also officers of the courts (New York Judiciary Law, Section 90).

The Constitution also gives the Court on the Judiciary the power to make its own rules and procedures for investigation and trial of a judicial officer. Pursuant to that authority the Court on the Judiciary adopted rules of practice, Rule V of which provides that upon convening of the Court it shall determine, preliminarily, whether the complaint for removal states facts sufficient to constitute a cause for the preferral of charges for removal and whether the charges which counsel designated to conduct the proceedings proposes to prefer are in a form fairly permitting answer.

In providing for such rule making power, the New York Construction did not intend that the Court on the Judiciary should be both accuser and judge and in exercising such power by the adoption of a rule that it make a preliminary determination as to the sufficiency of the complaint and the adequacy of the notice to be given that court did not place itself in a dual role of accuser and judge. A determination that such a complaint is sufficient to warrant the preferral of charges does not amount to the prejudging of such charges on the merits any more than does the denial of a motion to dismiss a complaint in a civil action for insufficiency. If there could be any doubt as to the extent of that court's action under Rule V it is dissipated by Rule VI which states what the court shall do after reaching a determination as to sufficiency of the complaint.

Like preliminary inquisitions as to whether disciplinary proceedings should be brought the considerations of the court under Rules V and VI are incidental and quasi administrative because the implied power to make such preliminary determination is a concomitant of the constitutional duty to consider charges of removal and the evidence adduced with respect thereto *(People ex rel. Karlin vs. Culkin,* 248 N. Y. 465, 479; *Matter of Richardson,* 247 N. Y. 401, 413).

The power to determine preliminarily whether there is a basis for a charge being preferred is for the protection of the person involved and not for the purpose of prejudging him.

Apart from misconstruing the New York State Constitution as requiring the Court on the Judicial to prefer charges for removal, appellant has not shown that as matter of fact that court did so and has not in any factual way brought into question the impartiality of the members of that Court, except in respect of their performance of the incidental duty of determining preliminarily the sufficiency of the charges and the adequacy of the notice and statement thereof for purpose of permitting answer. There is here no assertion, let alone proof, that the members of that Court had acquired extraneous knowledge of the facts yet to be presented. The open-mindedness of the members of the Court is conceded. Only their incidental knowledge of the reason or basis for the charges for procedural purposes is sought to disqualify them and such disqualification is sought to be accomplished only upon the innuendo that human frailty prevents the judicial mind from understanding that a charge of wrongdoing is not the equivalent of proof. This inference challenges not only the Court on the Judiciary's impartiality but also the impartiality of all our judicial procedures, both civil and criminal. It

suffices to say that if such human frailty is sufficient to establish bias and prejudging on the part of a judge who passes upon the sufficiency of a complaint in a civil action or an indictment or information in a criminal action then all our civil and criminal procedures fail to meet the test of due process. And that is true also of this Court's practice of noting probable jurisdiction.

We have been able to find only one instance in which an argument has been made comparable to the argument made in the brief for appellant. In the course of the Judicial Inquiry under the order of the Appellate Division, Second Department, which gave rise to these proceedings, subpoenas *duces tecum* were issued calling for the production of certain records before the Justice conducting the inquiry as an Additional Special Term. A motion to quash was made before another Justice holding a regular Special Term and a cross-motion was made to refer the principal motion to the Justice conducting the Judicial Inquiry.

Mr. Justice Hart denied the cross-motion (*Matter of Judicial Inquiry*, 14 Misc. 2d 863, 865-866), and in an opinion mentioned an argument that it would be unfair and improper to refer the principal motion to the Justice conducting the inquiry and cited *Sharkey vs. Thurston*, 268 N. Y. 123. (That was the case in which the Court of Appeals, while saying that "no man may be both accuser and judge," held that a Mayor who preferred charges against his appointees as Police Commissioners could also hold the required hearing thereon because in doing so he acted "not as a judge, but as an administrative officer.")

After Mr. Justice Hart's decision the Appellate Division, Second Department, ruled that motions made to quash subpoenas issued out of the designated Additional Special Term should be made to that Term and not to

another Special Term (*Matter of Judicial Inquiry*, 6 A. D. 2d 723, 724). Thus, the Appellate Division rejected the argument that the Justice conducting the Judicial Inquiry would be in such a case both accuser and Judge. This decision was entirely correct because in such a case it is the attorney appointed by the court to aid the Justice designated to conduct the Judicial Inquiry who issues the subpoenas, not the court.

We submit that the foregoing situation is analogous to this one in that counsel designated to conduct these proceedings preferred the charges, not the court.

It is to be noted that there is no provision in Article VI of the New York State Constitution that there has to be a complainant in order to convene the Court on the Judiciary. The Chief Judge of the Court of Appeals may do so upon his own motion and must do so on the written request of the Governor or a Presiding Justice of any Appellate Division, or a majority of the Executive Committee of the New York State Bar Association. However, if these provisions of the New York State Constitution are construed as requiring that there be a complainant in the first instance then the Presiding Justice of the Second Department undertook that role by his letter of July 2, 1962, in which he asked the Chief Judge of the Court of Appeals to convene the Court on the Judiciary in this instance.

The argument in support of the assertion at page 15 of the Jurisdictional Statement that the Court on the Judiciary was here the preferrer, prosecutor and trier of the charges is wrong in fact and in law. The Court on the Judiciary did not prefer the charges and did not prosecute them. It tried them.

The State Constitution does not mandate that that Court prefer such charges. Proceedings under Section

9-a of Article VI of the State Constitution as added in 1947 (now Section 22) are not in the nature of impeachment or punitive. The procedure thereunder where not expressed is clearly implied. It is implicit in Section 9-a of Article VI that counsel designated to conduct the proceedings shall prefer the charges, that in doing so their act is not the act of the Court but the act of the adversaries in the proceeding and that the members of the Court shall not be disqualified from finally determining the charges by making a preliminary determination as to the existence of facts sufficient to constitute cause for their preferral. The manifest intent of the framers of that section of the New York State Constitution was that the Court on the Judiciary should have the power to determine the physical, mental and ethical fitness of certain judicial officers to continue to perform their public trust and that that Court should in doing so, as it did here, comply with the reach of the 14th Amendment as to adequate notice and hearing.

Without any basis in fact and in disregard for the facts, appellant is here attempting to indirectly interject in these proceedings an issue as to the qualifications of the members of the Court on the Judiciary to determine the charges preferred against him.

The case of *In re Murchison*, 349 U. S. 133, relied upon by appellant (pp. 16-17), is not in point. There this Court held that a state law which permitted a Judge to act as a grand jury and then try the very persons accused as a result of his investigations constituted a denial of the fair and impartial trial required by the due process clause of the 14th Amendment. This Court in that case said: "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." As shown above, this Court on the Judiciary was not and could not be prosecutor of the

charges which were preferred against appellant by counsel designated to conduct the proceedings.

Appellant's citation of and quotation from *The Queen v. The London County Council,* 1 Q. B. 190, exceeds the bounds of ethical advocacy and, in fact, the clearly implied assertion in its citation and quotation is insulting in that it intentionally impugns without any justification the honesty and integrity of the Court on the Judiciary and that of counsel designated to conduct the proceedings. That case involved the hiring by some judicial officers of counsel specifically to plead their views before their own judicial colleagues.

On behalf of the Court on the Judiciary and on their own behalf counsel designated to conduct these proceedings, all of whom have been made parties appellee in this Court by appellant, assure this Court as officers of it and as judicial officials of the State of New York that neither the Court on the Judiciary nor any member thereof employed counsel designated to plead their personal prejudged views. If there is any doubt as to the unethical intent of appellant and his counsel in citing the case of *The Queen v. The London County Council,* it must dissipate in the face of their argument at page 15 that counsel designated are paid fees and expenses on order of the Presiding Judge of the Court on the Judiciary. Counsel who conducted these proceedings were employed to do so by the State of New York on order of the Court on the Judiciary as authorized by the Constitution of the State of New York. The fact that the case of *The Queen v. The London County Council* is cited and quoted from by appellant indicates appellant's general callous disregard of truth. 1238 of the 1379 pages of the record upon which the Court on the Judiciary made its decision were stipulated by appellant and the balance consists of appellant's unrestricted testimony on his own behalf. In other words, the case was submitted to the

Court by counsel designated to conduct it on proof agreed to by appellant and his own testimony.

The question in *Matter of Richardson,* 247 N. Y. 401, cited by appellant at page 21 was whether the governor acting pursuant to a state statute could direct a Justice of the Supreme Court of the State of New York to hear charges for the removal from office of the president of the Borough of Queens and to report to the governor the evidence taken and the findings thereon. The Court of Appeals held that this was an attempt to charge a Justice of the Supreme Court with the performance of nonjudicial duties. The New York Court held that the Legislature did not have the power to charge a Justice of the Supreme Court with the duties of a prosecutor in aid of the executive and that a Justice of the Supreme Court is disqualified while retaining office from acting as the delegate of the governor under the prohibition contained in Article VI of the State Constitution against a Justice of the Supreme Court holding any other public office or trust. (See Section 20 of Article VI of the New York Constitution.)

The holding in *Amos Treat & Co. v. Securities and Exchange Commission,* 306 F. 2d 260, cited by appellant at pages 18-19 is not in point, but a statement made therein is in point. There the Court held that a member of the investigating or prosecuting staff of the commission who participate in a decision of the Commission that an in- could not participate in deciding that proceeding upon later being made a Commissioner. This the Court held would violate the prohibition contained in 5 U. S. C. Section 1004(c) Act of June 11, 1946, c324, Section 5, 60 Stat. 239 because the exclusion clause therein that it did not apply to a member of an agency was inapplicable. The Court construed the exclusionary sentence as (p. 266) "intended to permit one who is a Commissioner to participated in the initiation of an adjudicatory proceeding

vestigation go forward and even that charges be filed to the end that an adjudicatory proceeding might be initiated." That was all that the Court on the Judiciary did here. In the federal statute involved in the *Amos Treat* case Congress permitted a member of the Commission to participate in the preliminary determinations whether there should be an investigation and whether charges should be filed and also to participate in the ultimate decisional process. The section of the New York Constitution here involved does no more than that in respect to members of the Court on the Judiciary. It does not make the members of the Court the complaining parties before themselves. Counsel designated to conduct the proceedings are the complaining parties. So the *Schlesinger Appeal*, 404 Pa. 584, cited by appellant at pages 19-20 is also not in point.

IV.

Neither appellant's proposed Question 2 nor his argument, Point II, in support thereof was mentioned in the Court on the Judiciary. In any event Question 2 is not presentable and the argument in support thereof is without merit.

Appellant questions and argues whether the provision in the New York Constitution authorizing removal for cause is so vague and without standards as to offend the Constitution of the United States. To state the propositions is to show that it is untenable. But apart from its facial defect it is not true.

Of course, "cause" for removal was intended to mean something substantial. As the Court of Appeals said in *People ex rel. Munday v. Fire Commissioners*, 72 N. Y. 445, 449, speaking of a similar provision in a statute:

> "This necessarily implies that the 'cause' is to be some dereliction or general neglect of duty, or incapacity to perform the duties, or some delinquency affecting his general character and his fitness for the office. The cause assigned should be personal to himself, and implying an unfitness for the place, and such cause being assigned, if unexplained, the removal may be made."

The test of whether sufficient "cause" for removal exists is: Do the acts charged against an officer, "justify the finding that his future retention of office is inconsistent with fair and proper administration of justice which the law entrusts to him" (*Matter of Droege*, 129 App. Div. 866, 882).

The case of *Cramp v. Board of Public Instruction*, 368 U. S. 278, relied upon by appellant (pp. 23-24) has nothing to do with this case because the facts and the applicable law are wholly dissimilar.

But even if the New York Constitution, despite its history as to cause for removal of a judicial officer (see Appendix to this brief) is vague, there is nothing vague as to the grounds upon which the charges for and decision of removal were based. From the outset appellant knew from the record in his brother's disciplinary proceeding the causes which existed for his removal from office.

V.

The reach of federal due process does not extend to the composition and constitution of a state court for the removal of state officers under state law; but even if it does, the Court on the Judiciary which removed appellant from his state office for cause, after notice and hearing, was duly composed and constituted and appellant has had due process.

As heretofore shown this Court has decided time and time again that federal due process does not extend to the manner in which state citizens are entitled to state offices or, if given notice and an opportunity to be heard, removed therefrom. *Snowden v. Hughes, supra,* 321 U. S. 1; *Cave v. Newell, supra,* 246 U. S. 650; *Taylor & Marshall v. Beckham, supra,* 178 U. S. 548; *Wilson v. State of North Carolina, supra,* 169 U. S. 586; *Allen v. Georgia, supra,* 166 U. S. 138.

Appellant's argument that the Court on the Judiciary "was not duly composed" is silly. The Court was composed of the six Judges specified by Section 9-a, paragraph 1 (now Section 22, paragraph b), of Article VI of the New York Constitution viz: the Hon. Charles S. Desmond, Chief Judge of the Court of Appeals, the Senior Associate Judge of the Court of Appeals, Hon. Marvin R. Dye, one Justice of each of the four Appellate Divisions, First Judicial Department, Hon. Benjamin J. Rabin; Second Judicial Department, Hon. Arthur D. Brennan; Third Judicial Department, Hon. William H. Coon; Fourth Judicial Department, Hon. Earle C. Bastow. There is no question that each was properly a member of the Court on the Judiciary, each of the Judges of the respective Appellate Divisions having been duly designated thereto by the Courts of which they were members; the Chief Judge and the Senior Associate Judge of the Court

of Appeals having been specifically designated by the Constitution. All heard and unanimously decided the first motions in the proceedings—appellant's oral motions on December 10, 1962, (1) to dismiss the charges and (2) to eliminate from the specification of the charges shown in the record of the M. Malcolm Friedman disciplinary proceedings (a) the so-called Shevack matter and (b) the failure to report income matter; all heard the testimony adduced by appellant in open court on January 11, 1963 (his own and one of his counsel's testimony); all heard the oral arguments of counsel on both sides on February 22, 1963, and all participated in the decision, four voting for removal (the majority required by the New York Constitution) and two voting to dismiss the charges on the merits (and not on the ground of insufficiency on their face or for any lack of procedural due process).

Appellant's sole complaint under his Point III (pp. 24-26) is that two of the six Judges of the Court on the Judiciary were not present on August 15, 1962, the day the Court met to consider whether these proceedings should be brought against appellant.

Prior thereto by letter dated July 2, 1962, Hon. George H. Beldock, Presiding Justice of the Appellate Division of the Supreme Court, Second Judicial Department, under the authority vested in him by Article VI of the Constitution of the State of New York (Section 9-a, subd. [4]; now Section 22, para. d), requested Hon. Charles S. Desmond, Chief Judge of the Court of Appeals to convene the Court on the Judiciary to consider matters involving the conduct of Louis L. Friedman, a Justice of the Supreme Court of the State of New York, Second Judicial District, which were disclosed in a report of Mr. Justice Bernard S. Meyer filed in the Appellate Division of the Supreme Court, Second Judicial Depart-

ment, in a proceeding entitled "In the Matter of M. Malcolm Friedman, an attorney, Denis M. Hurley, Petitioner; M. Malcolm Friedman, Respondent."

On August 15, 1962, Chief Judge Desmond of the Court of Appeals convened the Court on the Judiciary as mandated by Article VI of the Constitution of the State of New York (Section 9-a, subd. [4]; now Section 22, para. d). At that time the Court by orders adopted rules, appointed a clerk of the court and designated counsel to conduct the above entitled proceedings and determined preliminarily that sufficient facts as to the conduct of Hon. Louis L. Friedman, Justice of the Supreme Court, Second Judicial District, were disclosed in the report of Mr. Justice Bernard S. Meyer in the proceeding "In the Matter of M. Malcolm Friedman, Attorney" for the preferral, by counsel designated to conduct the proceedings, of charges for Louis L. Friedman's removal from office for abuse thereof, and that the form of the charges proposed by counsel fairly permitted answer.

Two of the Judges designated as members of the Court on the Judiciary were not present on that day, Judge Dye and Justice Rabin. However, the preliminary orders and preliminary determinations were made upon the vote therefor of all four of the members present. Section 9-a (now Section 22) of Article VI of the New York Constitution does not require that all members of the Court on the Judiciary have to be present when any action is taken by the Court. Nor does it specify the number required for a quorum. It simply provides:

> "*The trial* of charges for the removal of a judicial officer or of the grounds for his retirement shall be had before a court on the judiciary. The affirmative concurrence of not less than four members of the court shall be necessary for the removal or retirement of a judicial officer."

It further provides:

> "The court shall have power (a) to designate in each case involving a judicial officer an attorney or attorneys at law to act as counsel to conduct the proceeding; (b) to summon witnesses to appear and testify under oath and to compel the production of books, papers, documents and records before such counsel in advance of the trial and before the court upon the trial; (c) to make its own rules and regulations concerning the procedure to be adopted for the investigation and trial of a judicial officer * * *."

Among the rules which the Court adapted on August 15, 1962 were the following:

Rule I

> "Four members of the court shall constitute a quorum and the affirmative concurrence of four shall be necessary for a decision except that where less than four members of the court shall vote in favor of the removal or retirement of a judicial officer, an order shall be entered dismissing the proceeding."

Rule V

> "Upon convening of the court, it shall determine, preliminarily, whether the complaint for removal or grounds for retirement of a judicial officer that have been presented, state facts sufficient to constitute cause for the preferral of charges for removal or ground for retirement; and are in form fairly permitting an answer."

Rule VI(a)

> "If such complaint for removal or grounds for retirement are determined sufficient within Rule V, the court shall direct that a statement of the charges alleged for removal or of the grounds alleged for

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retirement be personally served on the respondent, who shall within twenty days of such service, file his answer with the clerk of the court and serve a copy on counsel, if any, designated by the court to conduct the proceeding."

The rule that four members shall constitute a quorum was proper because the concurrence of four out of six judges is all that the New York Constitution required to remove a judicial officer. And four here decide that there was a basis for charges being preferred against appellant. There is no suggestion that in so deciding those four Judges acted on any personal basis or not on the record in the M. Malcolm Friedman disciplinary case which caused the Presiding Justice of the Second Judicial Department to request the convening of the Court on the Judiciary. As a matter of fact one of the Judges who voted that there was a basis for preferral of charges voted after hearing and studying the evidence presented that the charges should be dismissed on the merits (Justice Brennan).

It is significant that no authority is cited by appellant for the proposition that he was denied due process under the Constitution of the United States by reason of the fact that two of the Judges of the Court were not present when the preliminary procedural steps were taken in initiating these proceedings. Of course appellant did not object to the composition of the Court as he admits because his motion to dismiss the charges, his testimony, the summation of counsel for both sides and the conferences of the Court which resulted in the denial of the motion to dismiss the charges and the order of removal were attended by all six judges of the court. Nor is there any merit to appellant's claim that he was misled. The minutes of the court were available to him. And in any event it was no secret that Judge Dye was at the American Bar Association meeting in San Francisco and Justice Rabin was in Europe. Ap-

pellant knew or should have known this but whether he did or not is unimportant. He had an opportunity to raise the question, did so, and it was decided against him.

As the Court held in denying appellant's motion to vacate the order of removal:

> "The Court on the Judiciary was duly convened pursuant to the Constitution and at all its sessions there were present members sufficient to constitute a quorum under the court's rules adopted pursuant to the provisions of the Constitution."

The main point here is that it is a matter of state law whether the Court on the Judiciary of the State of New York was "duly composed and constituted" and the Courts of New York have held it was and that should end the matter so far as this Court is concerned (*Kovacs v. Cooper*, 336 U. S. 77, 84-85; *Lovell v. Griffin*, 303 U. S. 444; *Winters v. New York*, 333 U. S. 507, 514), particularly in view of the fact that appellant unquestionably and unquestionedly had a fair trial on the record he stipulated and his own testimony and neither has pointed nor can point to any right under the Federal Constitution of which he was deprived. Otherwise this court is going to be called upon to interpret and construe *de nova* state ordinances, statutes and constitutions and "to supervise and review the political administration of a state government by its own officials and through its own courts." (*Allen v. Georgia, supra*). Appellant had his day in court and was properly fired because he had abused his office.

VI.

Appellant's Point IV (Jurisdictional Statement, pp. 26-27) is not only wrong, it's fraudulent.

Appellant was not tried on two charges not contained in the statement of charges served on him. The third charge was: "That Louis L. Friedman has abused his public office as a Justice of the Supreme Court of the State of New York, Second Judicial District * * * (3) by violating and failing to observe the concept, spirit and letter of the canons of judicial ethics, and by causing M. Malcolm Friedman to violate and to fail to observe the canons of professional ethics." Appellant knew that this charge covered the so-called Shevack matter and the failure to report income tax matter which were tried at length in the disciplinary proceedings against his brother, the record in which gave cause for the Presiding Justice of the Appellate Division, Second Judicial Department, to request the convening of a Court on the Judiciary and for the initiation of these proceedings. As has been pointed out appellant did not ask for or need a bill of particulars as to the scope of the third charge. He had the record and the report in the proceeding involving his brother and he knew that the practicing law and income tax matters were covered thereby. In the extended and battling negotiations between counsel designated to conduct the proceedings and appellant's counsel as to what parts of the record made in M. Malcolm Friedman disciplinary proceeding would be stipulated as part of the record in this proceeding appellant was well aware that charge Number 3 covered the Shevack and income tax matters. That is why appellant moved to have those matters deleted from the charges and eliminated from the case. Furthermore, after the denial of that motion appellant stipulated that the parts of the record in his brother's disciplinary proceeding relevant to those issues be made the record herein upon those

issues. Those issues were not as appellant says "added and allowed by the Court over objection on December 10, 1962" (Jurisdictional Statement, p. 27). They were matters which, as appellant knew, prompted the call for the convening of a Court on the Judiciary.

Again significantly appellant cites no authority for his assertion that he was denied due process in this respect. While the nature of the notice given to the New York Legislature of the charges preferred against appellant raises no federal question, it should be noted that the New York Constitution does not require the Presiding Judge of the Court on the Judiciary to do more than "give written notice to the governor, the president of the senate and the speaker of the assembly of the name of the judicial officer against whom such charges have been preferred, of the nature of the charge and the date set for the trial thereof." This was done. Neither the specifications nor the evidence upon which the charges were based had to be submitted. The charges were preferred against appellant upon the basis of a public record and if the Legislature had deemed it warranted to prefer the same charges against appellant on the basis of that public record it could have done so.

VII.

Appellant's Point V (pp. 27-29), presents no federal question and is irrelevant.

The fact that under state law appellant could have been removed from office upon the same evidence considered by the Court on the Judiciary by other state procedures, as shown in the appendix hereto, raises no federal question and is irrelevant. He was removed and properly removed

under established state procedure which conformed in every respect with the requirements of due process under the Federal Constitution.

VIII.

The answer to Appellant's Point VI is that the right of an appeal on the merits is not guaranteed or mandated by the due process clause of the Federal Constitution so long as the denial of a right of appeal is not discriminatory.

"While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process" (*National Union of Marine Cooks v. Arnold*, 348 U. S. 37, 43 and cases cited). The New York Constitution provides no right of review by another State Court of an order and judgment of the Court on the Judiciary and in the absence of such a provision there is no right to appeal therefrom to another state court (*Matter of Droege*, 197 N. Y. 44; *Ex Parte Johnson*, 3 Cow. 371; *In the Matter of Louis L. Friedman*, 19 A. D. 2d 120, Appendix D to the Jurisdictional Statement). See the New York Constitutional History of Removal of Judicial Officers attached hereto as Appendix I.

CONCLUSION.

No substantial federal question is presented by this appeal and this Court should either grant the motion to dismiss or the motion to affirm.

Respectfully submitted,

Dated: July 30, 1963.

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APPENDIX I.

New York Constitutional History of Removal of Judicial Officers.

The First Constitution of New York, adopted April 20, 1777, provided for a Court for the Trial of Impeachments, consisting of the President of the Senate, the Senators, Chancellor and Judges of the Supreme Court. The power of impeachment, i. e., to institute a removal proceeding, was vested in the assembly and two-thirds of its members present had to consent to such impeachment (Sections XXXII and XXXIII). Implicit in these provisions were the requirements for a charge, service of notice thereof, and an opportunity to be heard. (See Section XXXIV which provided that the party impeached should be allowed counsel.) There was no provision expressed or implied in that Constitution for review of a determination of the Court for the Trial of Impeachments.

The Second Constitution of New York, framed in 1821 and approved by the people and effective in 1822, contained similar expressed and implied provisions except that an impeachment required the concurrence of a majority of all of the members elected to the Assembly (Article V, Sections 1 and 2). In addition, that Constitution provided in Article IV, Section 7, that a justice of the peace could be "removed by the county court, for causes particularly assigned by the judges of the said court. And no justice of the peace shall be removed until he shall have notice of the charges made against him, and an opportunity of being heard in his defense" (Justices of the courts in the City of New York were removable in like manner under Section 14). Under that Constitution judges of the county courts and recorders of cities could be removed by the Senate on recommendation of the Governor for causes stated in such recommendation (Article V, Section 6).

That Constitution also provided in Article I, Section 13 that: "All officers holding their offices during good behavior may be removed by joint resolution of the two houses of the legislature, if two-thirds of all the members elected to the assembly and a majority of all of the members elected to the senate, concur therein." Under this provision, the Legislature had the power to remove a judge without assigning any reason therefor or giving him an opportunity to be heard (Lincoln, Vol. IV, p. 562). Its purpose was to secure responsibility where judges were not liable to impeachment, i. e., in cases of impairment of faculties by casualty, sickness, infirmity and intemperance (Debates, p. 443). There was no provision in the Second Constitution for review of a determination of a body vested thereby with the power to remove a judicial officer and in *Ex Parte Johnson*, 3 Cow. 371, it was held that the Supreme Court of New York had no power to review a determination of the County Court under Article IV, Section 7.

The Second Constitution was amended in 1845 so as to provide that no judicial officer should be removed by joint resolution by the two houses of the legislature or by the senate upon recommendation of the Governor unless the cause of such removal was entered on the journal of both houses or of the senate, as the case might be, and the judicial officer was served with a copy of the causes alleged for his removal and was afforded an opportunity to be heard in his defense (New York State Constitution, Annotated, Constitutional Convention Committee 1938, Vol. I, Part II, p. 43).

The Third Constitution of New York, approved by the peachments composed of the president of the senate, the people in 1846, continued the impeachment power of the assembly by vote of the majority of all of the members elected and provided for a Court for the Trial of Imsenators, or a majority of them, and the judges of the

court of appeals or a majority of them. Conviction required concurrence of two-thirds of the members of the court present (Article VI, Section 1). Section 11 of Article VI of that Constitution provided that justices of the supreme court and judges of the court of appeals could be removed by a concurrent resolution of both houses of the legislature upon the concurrence of two-thirds of the members elected to the assembly and a majority of the members elected to the senate. All other judicial officers, except justices of the peace and judges and justices of inferior courts not of record, could be removed by the Senate upon recommendation of the Governor. But, no removal could be made under that section unless the party complained of had been served with a copy of the complaint against him and had opportunity to be heard in his defense. Justices of the peace and judges and justices of inferior courts not of record could be removed after due notice and opportunity to be heard by such county, city or state courts as prescribed by law for causes assigned in the order of removal (Article VI, Section 17).

In his Constitutional History of New York, Lincoln says that before the Governor could make a recommendation for removal of a judicial officer he had to conduct a preliminary proceeding and give the accused officer an opportunity to be heard (Lincoln, Vol. IV, p. 588).

The Judiciary Article of the Third Constitution was amended with the approval of the people in 1869. Section 1 of the amendment continued the impeachment power of the assembly by vote of a majority of its elected members and provided for a court for the Trial of Impeachments, composed of the president of the senate, the senators or a majority of them and the judges of the court of appeals or a majority of them. By Section 11 of that amendment, judges of the court of appeals and justices of the supreme court could be removed by concurrent resolution of both houses of the legislature if two-thirds of the elected mem-

bers of each concurred. All other judicial officers, except justices of the peace and judges and justices of inferior courts not of record, could be removed by the Senate on the recommendation of the Governor, if two-thirds of the elected members concurred. But no removal could be had under that section unless the party complained of had been served with a copy of the charges against him and had opportunity to be heard. Under Section 18 justices of the peace and judges or justices of inferior courts not of record could be removed after due notice and opportunity to be heard by such courts as prescribed by law.

The Fourth Constitution of New York, adopted by the people in 1894, by Article VI, Sections 11, 13 and 17 continued by like provisions, the foregoing power of removal by concurrent resolution of both houses of the legislature or by impeachment and trial of judges of the court of appeals and justices of the supreme court. All other judicial officers, except justices of the peace, and judges or justices of inferior courts not of record, could be removed by the senate on recommendation of the Governor if two-thirds of the members elected concurred. But, where removal was by concurrent resolution or by the senate on the recommendation of the Governor the cause for removal had to be entered in the journals, "a statement of the causes alleged" served, and an opportunity to be heard given. Removal of justices of the peace and judges or justices of inferior courts not of record could be for cause, if due notice and opportunity of being heard were given, by such courts as prescribed by law. The phrase "a statement of the causes alleged" was substituted for the word "charges" to insure that removal could be because of illness or incapacity as well as because of dereliction (Lincoln, Vol. IV, p. 566). No provision was contained in the Fourth Constitution for review of a determination made by a body thereby vested with the

power of removal of a judicial officer and in *Matter of Droege*, 197 N. Y. 44, the Court of Appeals held that it had no power to review a determination of the Appellate Division removing a city magistrate from office under Article VI, Section 17.

The Judiciary Article of the Fourth Constitution was amended with the approval of the people in 1925. By Section 9 of that amendment, judges of the court of appeals, and justices of the supreme court could be removed by concurrent resolution of both houses of the legislature, if two-thirds of the elected members of each concurred. All other judicial officers, except justices of the peace, justices of the municipal court of the city of New York and judges and justices of inferior courts not of record, could be removed by the senate, on the recommendation of the Governor, if two-thirds of the members concurred. But, no officer could be removed under that section except for cause entered upon the journals and unless he had been served with the statement of the cause alleged and had opportunity to be heard. Section 10 of that amendment continued the assembly's power of impeachment and provided for a court for the Trial of Impeachments composed of the president of the senate, the senators or a majority of them and the judges of the court of appeals or a majority of them. Under Section 17 of that amendment justices of the peace, justices of the municipal court of the city of New York and judges or justices of inferior courts not of record could be removed for cause after due notice and opportunity of being heard by such courts as prescribed by law.

The Constitutional Convention of 1938 in submitting a proposed whole Constitution (the Fifth) to the voters at the general election on November 8, 1938 divided it into 9 propositions, the 5th of which covered the Judiciary Article. This 5th proposal was rejected by the people. Part of this proposal included the following:

"Notwithstanding the foregoing provisions a justice of the supreme court, a judge of the court of claims, a surrogate or special surrogate, a judge of a court of general sessions, a county judge or special county judge, or a justice of the city court of the city of New York, may be removed for cause or may be retired for permanent mental or physical disability preventing the performance of his judicial duties, by the court of appeals, either upon its own motion or upon the recommendation of the appellate division of the department within which the justice, judge or surrogate resides, provided, however, that no justice, judge or surrogate shall be so removed or retired unless he shall first have been served with a written notice of the proceeding therefor and a statement of the cause or disability alleged and shall have been given an opportunity to be heard. Removal for cause shall be upon the concurrence of five of the elected judges of the court of appeals" (Vol. IV of the Revised Record of the 1938 Convention, p. 3433).

The debates of the 1938 Constitutional Convention show the following reasons for this proposal:

"Mr. Sears: * * * This proposal came to the Convention on the recommendation of the Bar Associations or some of them in New York City. It was thought that it was beneficial to the judiciary to have this power to remove in the Court of Appeals, where it would not be involved in the controversies of the Legislature and the politics there involved, and it would give to the person who was incapacitated a right to be retired and the recommendation as it came is that the Legislature should provide for compensation for such retiring judges. This whole proposal was looked upon as being for the benefit of the judicial personnel." * * * (p. 2011).

"Mr. Foley: * * * I think this is a very salutary provision. I think it will shorten the process very much. There are very few cases; I do not

know of any case in the last 25 years in which a judge was impeached or removed by the Legislature." * * * (p. 2014).

"Mr. Martin: * * * I think this is one of the most important provisions to put in the judiciary law. At the present time if a judge is incapacitated, and there are judges incapacitated for two and three years, and nobody wants to go to the trouble of starting an impeachment proceeding against them, nobody wants to harm them, this hearing would have the effect of being a private trial. It would not be spread all over the country and it would have the double effect if a judge is impeached this ends his right to salary. He can never get another dollar. And under this provision, if he should be retired, he could be retired at any compensation that the Legislature would fix.

"There has been a widespread demand that something be done along this line, and this is not only the safest way but the best way for any judge who is incapacitated and unable to do his work to be taken care of" (p. 2014).

"That was put in there so that, if there was any question of the mental or physical disability or inability of the judge to do the work, and it was claimed that it was not physical or mental, they could remove him for cause." * * * (p. 2015).

"Mr. T. J. Curran: Was it the intention of the Court of Appeals in holding such a hearing, where a man was to be removed for cause, that they would hold a private hearing.

"Mr. Martin: That would be entirely within the discretion of the Court of Appeals. If they were given the power to hold the hearing they would have to decide whether it would be private or public, the way the courts do today" (p. 2015).

"Mr. Sears: I take the word 'cause' in this section to be the same wherever it occurs. The removal by the Legislature is to be for cause and the person charged with the delinquency or cause must have an opportunity to be heard. It is exactly the same with respect to the right here given to the

Court of Appeals. I suppose that if the person charged asked the Court of Appeals to have a hearing in private, that would be granted. I suppose the Court of Appeals has judgment enough to know what should be done under such circumstances. If the person charged with cause wanted a public hearing, can you imagine the Court of Appeals denying it to him? I cannot. I feel that we can trust the Court of Appeals in this matter. The man who is charged with a cause has a right to be heard, that is, to produce his evidence, and every protection is afforded to him by this article and, further, it enables the judicial system to attend to the elimination from the personnel all persons who may be charged with delinquency. That is all it does. Because there has not been any case in the Legislature for 25 years is no reason why we should not provide for this case a proper case for such action may arise" (p. 2017).

"Mr. Sears: * * * the people who proposed this had in mind those cases where, perchance, the incompetent did not realize his situation or could not accede to it, although it might be perfectly clear to everyone else, or perchance was mentally incompetent and could not file a resignation. All those situations are covered in this simple provision, and I earnestly hope that this will not be stricken from the judiciary article" (p. 2018).

"Mr. Martin: Doing him a favor by removing him if he is incompetent or has become insane as has happened before to judges sitting on the bench, not able to comprehend their condition and not able to do anything about it. Nobody is going to impeach them, and this provision was made to meet such a condition" (2018).

This proposal did not then become a part of our Constitution because of the rejection by the people of the entire Judiciary Article proposed by the 1938 Convention. But there is no claim, or ground for such claim, that this particular proposal had anything to do with the people's rejection of the proposed Judiciary Article.

Adoption of Present Provision.

The Constitution was amended by necessary action of the legislature and by adoption by the people on November 4, 1947, effective January 1, 1948, so as to include in the Judiciary Article, Section 9-a. This amendment contained the substantive provisions now contained in Section 22 of Article VI of the Constitution adopted by the people November 7, 1961, effective September 1, 1962, quoted above.

In addition to the provisions quoted above, the Judiciary Article of the present Constitution contains provisions in Section 23 for removal of judges of the court of appeals and justices of the supreme court by concurrent resolution of both houses of the legislature by a two-thirds vote of the members elected to each house. That section also provides for the removal of judges of the court of claims, the county court, the surrogate's court, the family court and the courts of the city of New York, the district court and such other courts as the legislature might determine by the senate on the recommendation of the governor if two-thirds of the members elected to the senate concur. However, no judge or justice can be removed under that section except for cause entered on the journal and unless he shall be served with a statement of the cause alleged and shall have opportunity to be heard. Section 24 of the present Constitution gives the assembly the power of impeachment by a vote of a majority of the members elected thereto and provides for a court for the Trial of Impeachments composed of the president of the senate, the senators or a majority of them and the judges of the court of appeals or a majority of them.

In summary we have in our present state Constitution substantially the same procedure for removal from office of a justice of the supreme court by the impeachment

method first provided in the Constitution of 1777 and by the joint resolution method first provided in the Constitution of 1822 and since 1948 we have had an alternative and less cumbersome procedure of removal by a Court on the Judiciary designed not only to permit removal for cause involving ethical considerations but also for mental and physical incapacity.

The significance of this history of the New York Constitutional procedures for removal of judicial officers is that it shows that this state has from its very beginning made provision for such removal by a fair and impartial procedure and that there never has been any provision in any constitution of the State of New York for review by a State Court of a determination of a body vested with the power to remove a judicial officer for cause after notice and hearing.

The only cases directly in point are those previously cited: *Matter of Droege*, 197 N. Y. 44 and *Ex parte Johnson*, 3 Cow. 371, both of which held that a determination made by a body vested with the constitutional power of removal of a judicial officer is *not* reviewable by a court of this state. See, also, *Matter of Friedman*, 19 A. D. 2d 120.

In *Matter of Droege*, the question was whether the Court of Appeals had jurisdiction to review a determination made by the Appellate Division ordering the removal of Droege from the office of City Magistrate under the provisions of what was then §17 of Article VI of the New York Constitution. In dismissing the appeal the Court of Appeals said (197 N. Y. 44, 51-52):

> "Quite apart from definitions and legal nomenclature, we regard this as a proceeding in which we cannot assume jurisdiction without substituting our judgment and discretion for that of the Appellate Division. That court is vested with the power of removal 'for cause.' Neither the Constitu-

> tion nor the statutes have attempted to define what that 'cause' shall be. If this court should undertake to decide upon the sufficiency or insufficiency of a 'cause' passed upon by the Appellate Division in such a case it would be an assumption of power by this court, which the Constitution and the statutes have granted exclusively to the Appellate Divisions. The case at bar is not to be distinguished from *Ex parte Johnson* (3 Cow. 371). The Constitution of 1821 provided that justices of the peace might be removed by the County Court for causes particularly assigned by the judges of that court. In *Johnson's* case an application was made to have him removed from the office of justice of the peace for making a false return to a certiorari, and for keeping his office in a grog shop. The County Court denied the application by simply refusing to consider the matter. Upon application to the Supreme Court for a writ of mandamus to compel the County Court to take cognizance of the matter, the Supreme Court said, *per curiam:* 'The whole was a mere matter of discretion with the Common Pleas. Under the Constitution (art. 4 §7) they are the sole judges whether they will notice the charges preferred or not. They hold a constitutional power, with which we will not interfere.' For these reasons the appeal should be dismissed."

The courts of New York State have not undertaken to review an exercise by the Legislature of its power of removal of a judicial officer. In fact, there have been only two instances in which the Legislature has exercised that power:

1872 John H. McCunn: Justice of the Superior Court of the City of New York. Assembly judiciary committee investigated charges and transmitted a report to the governor with a request that "it be recommended to the senate to take proceedings for the removal of said John H. McCunn from his office of justice of the superior court of the city of New York." At an extra session of the senate the proposition received 28 affirmative votes, and

there were no votes in the negative. Justice McCunn was removed from office (4 Lincoln, Constitutional History of N. Y. [1906] 585-6; 6 Messages from the Governor [N. Y.] [1909] 498).

1872 George G. Barnard: Justice of the Supreme Court. Articles of impeachment and trial. He was found guilty, removed from office, and declared to be disqualified from holding any office of honor, trust, or profit (4 Lincoln, Constitutional History of N. Y. [1906] 605, 607).

The courts of New York State have not undertaken to review an exercise of the power vested in a court of this state of removal of a judicial officer for cause. As shown above, *Matter of Droege* and *Ex parte Johnson* hold that a determination of a court vested with such constitutional power is not reviewable by other state courts, absent a constitutional provision for such a review.

There is one case, however, which needs explanation, *Matter of Levy*, 229 N. Y. 637. In that case an appeal was taken to the Court of Appeals from an order of the Appellate Division overruling an objection of a Justice of the Municipal Court of the City of New York to the jurisdiction of the Appellate Division to entertain charges preferred against him to effect his removal. After denying his motion to dismiss charges made against him on the ground that the Court had no jurisdiction to entertain the same the Appellate Division certified to the Court of Appeals the following question: "Has the Appellate Division of the Supreme Court, first department, jurisdiction to remove respondent, Aaron J. Levy, from his office as a justice of the Municipal Court of the city of New York, or to entertain any charges preferred against him to effect such removal."

As shown above, the Fourth Constitution adopted in 1894 (involved in the *Levy* case) provided that removal of a justice of an inferior court not of record could be for cause by such courts as prescribed by law. The Municipal Court of the city of New York was at the time of the adoption of the Constitution of 1894 a statutory inferior local court and not a court of record and under §132 of the Code of Criminal Procedure the power to remove justices thereof for cause was vested in the Appellate Division (Laws of 1909, Chapter 66; Laws of 1901, Chapter 466, §1383; Laws of 1907, Chapter 603).

In 1915 after the adoption of the Municipal Court Act by Chapter 279 of the Laws of that year, §1383 of the Revised Greater New York Charter was amended by Chapter 581 of the Laws of that year by omitting the word "justices" from the section vesting in the Appellate Division the power of removal of officers of the Municipal Court and Chapter 279 of the Laws of that year made the Municipal Court a court of record. Justice Levy contended that the Appellate Division had no jurisdiction of the charges preferred against him to effect his removal because by Chapter 279 of the Laws of 1915 the Municipal Court was made a court of record.

The Appellate Division held in the *Levy* case (192 App. Div. 550) that the Municipal Court being an inferior court not of record at the time of the adoption of the Constitution, the justices thereof could be removed by the Appellate Division and that "* * * the Legislature could not directly or indirectly deprive it of any of the jurisdiction so conferred and possessed."

It was on this ground that the Appellate Division denied Justice Levy's motion to dismiss the charges made against him.

Being in doubt, however, of the correctness of its interpretation of the constitutional provision, the Appellate Division certified to the Court of Appeals the foregoing question. The Court of Appeals answered the question in the affirmative.

An examination of the record on the appeal to the Court of Appeals from the order of the Appellate Division in that case will show that no question was raised as to the power of the Court of Appeals to consider the certified question. Having been asked by the Appellate Division for an answer to the certified question as to the jurisdiction of the Appellate Division, the Court of Appeals treated the appeal to it as one in a proceeding as to which it had jurisdiction to advise the Appellate Division of its power under the Constitution. In so answering the certified question, the Court of Appeals held that the Legislature did not deprive the Appellate Division of the power to remove justices of the Municipal Court by making that court a court of record subsequent to the adoption of the Constitution.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 285

In the Matter of Proceedings Pursuant to Section 9-a (amended to Section 22) of Article VI of the Constitution

In Relation to

LOUIS L. FRIEDMAN, Justice of the Supreme Court, Second Judicial District,

Appellant,

against

COURT ON THE JUDICIARY OF THE STATE OF NEW YORK, by JOHN R. DAVISON, ESQ. and WILLIAM R. BRENNAN, ESQ., Counsel Designated by Said Court to Conduct the Proceedings,

Appellee.

ON APPEAL FROM COURT ON THE JUDICIARY OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM

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IN THE

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Appellee.

ON APPEAL FROM COURT ON THE JUDICIARY
OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM

Statement

Appellee's brief in support of its motion to dismiss or affirm does not meet any of the issues or answer the questions presented to this Court in the Jurisdictional Statement heretofore filed.

Instead, its submission includes approximately 39 pages of *distorted factual material* with much of it taken out of

context, and incorrect citations of law. If appellant answered each of those incorrect factual presentations, it would unduly lengthen this brief and serve no useful purpose, since the facts are only necessary insofar as they affect the questions presented. Nevertheless, a few illustrations appear appropos, and they will be set forth herein.

Additionally, many of appellee's citations between pages 39 and 62 of its brief are likewise inaccurate, in that they are either not in point, or do not support the statement of law for which they are cited. In at least one instance (*Allen* v. *Georgia*, 166 U. S. 138 pp. 41-42, Appellee's Brief), the quotation submitted is not included in the citation given.

Aggravating this type of submission, are designated counsel's unfounded several statements in their brief, that the undersigned's (1) "citation of and quotation from *The Queen* v. *The London County Council*, 1 Q. B. 190, exceeds the bounds of ethical advocacy"; that it "is insulting in that it intentionally impugns without any justification the honesty and integrity of the Court on the Judiciary and that of counsel designated to conduct the proceedings." (p. 50, Appellee's Brief); (2) that appellant's counsel show "unethical intent" in citing that case (p. 50, Appellee's Brief); (3) that the argument as to the improper composition of the Court on the Judiciary "is silly" (p. 54, Appellee's Brief); and (4) that appellant's Point IV of the Jurisdictional Statement is "fraudulent" (p. 60, Point VI Appellee's Brief). Nothing in either the record or appellant's Jurisdictional Statement justify such irresponsible charges against appellant's counsel.

Some of Appellee's Factual Distortions

At page 7 of appellee's brief is the statement that "for the year 1955," appellant's former partnership "reported their *taxable* partnership income was $269,923 (R. pp. 1243a, 1247a-1249a)." A reference to the record referred to shows

that the said sum was *gross income* of the firm and not *taxable income*. Incidentally, the charge against appellant of income tax violation had no basis in fact and was not sustained.

At two places (pp. 7-8 appellee's brief), and in their discussion of the *Shevack* case (pp. 33-39 appellee's brief), designated counsel attempt the innuendo that appellant practiced law while on the bench. Although evidence with respect to such a charge was admitted over appellant's objection that no such charge was ever therefore made, and that receiving evidence relating thereto was in effect adding another charge, the Court on the Judiciary never made any such finding against appellant, and it is grossly unfair and improper for designated counsel now again to make the same contention in their brief.

The statements on pages 8-9 of appellee's brief impute a sinister motive to appellant because, with his brother's consent, he took all the financial records with him when he was appointed to the bench (October, 1955). As in most large law firms, only one of the partners (appellant) supervised the firm's financial records (R. Vol. II, 652a, 659a). The brothers were both bachelors until 1953 (R. Vol. IV, 1282a), and all of their investments were jointly owned, and all supervised by appellant (R. Vol. II, 673a, 735a). His appointment to the bench (on but two days notice) (R. Vol. IV, 1319a-1320a) necessitated a liquidation of the firm, and so the partner who knew about the financial records, took them with him by consent, to supervise the liquidation, which ended in Dec. 1962 (R. Vol. IV, 1248a). A gradual liquidation was the proper procedure under the Internal Revenue Code (Sec. 736, Int. Rev. Code; April, 1960, N. Y. State Bar Assn. Bulletin, p. 115 *et seq.*).

Since the same accountant worked at the same time on both the liquidation books and the individual books of the remaining partner, it seemed perfectly proper that this be done in chambers. Appellant was still responsible for

filing income tax reports as to the liquidation and paying the tax therupon. It seems incredible that such an innocent act could be charged and found against appellant as an abuse of his public office as a Justice of the Supreme Court. Assuming even that later events showed that it would have been wiser to leave the financial records at the law office and go back there from time to time to consult with the accountant, "A wisdom developed after an event and having it and its consequences as a source is a standard no man should be judged by." *Costello* v. *Costello*, 209 N. Y. 262.

As the only one who knew anything about the financial affairs of the two brothers, appellant had to either go to that law office or have the work done in his chambers. Appellant selected chambers, where he attended every day, as the more convenient place.

The statement in appellee's brief (p. 14) "that appellant was aware because he was told why it was not feasible to examine the books in his Supreme Court Chambers" is incorrect. Nothing in the record shows that any information with respect thereto was ever given to appellant. Notwithstanding the many pages devoted to the details of the proceedings which took place, appellee's brief now concedes that appellant was willing to "make arrangements so that they could see it (the books and records) in private" (p. 9, Appellee's Brief); that appellant's brother "asked that they be inspected in * * * Chambers" (p. 10, Appellee's Brief); that Mr. Hurley conceded that appellant said that he would "permit an examination of them in his chambers" (p. 11, Appellee's Brief); and that "Colonel Dykman * * * offered to make a room in his office available for the inspection of the records by the accountants for the Judicial Inquiry", p. 13, Appellee's Brief). In addition, the statement by the then presiding Justice Gerald Nolan, which is set forth in full on pages 7 and 8 of the Jurisdictional Statement, clearly illustrates that appellant at-

tempted to find some method, even before any subpoena was ever served upon him, to have the books inspected in private.

The statement at page 24 of appellee's brief to the effect that Justice Baker (who was later in charge of the Inquiry) ruled that "A Supreme Court Justice has no constitutional or statutory immunity from being subpoenaed as a mere witness * * *" is taken completely out of context. This ruling *upheld appellant's contention* that there was no authority for an investigation of the Justices of the Supreme Court in their judicial capacity, and that any interrogation of appellant could only be as a witness. The Jurisdictional Statement (pp. 10-11) shows the attempts to investigate appellant's judicial conduct without any authority to do so. Appellant's objection was that he was being singled out amongst all of the many Justices in Kings County, without any authority in the Judicial Inquiry to conduct such an investigation under the order of its appointment. Being so singled out created an unfair impression about appellant in the minds of the public.

At page 27 of its brief, appellee states that "appellant caused his brother to violate the Canons of Professional Ethics for which his brother is now being disciplined." Such a charge was made against appellant *but no such finding was made* (see Appendix A, p. 33, Jurisdictional statement).

At page 39 of its brief, appellee states that appellant caused "his brother, Malcolm, to be found guilty and disciplined for failure to report income." No such finding was made by the Court on the Judiciary. As a matter of fact, the only amount of unreported income which was ever shown for the three year period involved was $88.88, and it is unfortunate that such a minimal amount, conceded by appellant's brother as having been unreported through error by the accountant, should have been the basis for discipline, particularly since the Federal Government, after investigation, did not see fit to institute criminal action or assess any fraud penalty with respect thereto. Research fails to

disclose any other case in New York State where a lawyer was disciplined for income tax violation without prior fraud or criminal proceedings by the government. The charges in this respect against appellant were dismissed by the Court on the Judiciary.

A final illustration of the many record distortions in appellee's brief (p. 32) is the statement that a finding was made that appellant's testimony was "incredible" with respect to the 1953-1954 records which had been disposed of about a year before the inquiry started.

No such evidence appears in this record and no such finding was ever made. The record shows that about eight months after appellant's appointment to the bench, he cleaned out about 6,000 closed legal and financial files dating back to 1928 (R. Vol. IV, p. 1288a). Included were all files containing financial records through 1954 which had already been audited by the Income Tax Bureau.

Designated Counsel's method of handling facts has been illustrated. They used the same methods against appellant in the court below, and perfectly innocent transactions become the basis for a claim that appellant abused his public office as a Justice of the Supreme Court, even though none of the matters involved were even remotely connected with any of the thousands of judicial matters over which he presided, and there was no charge of corruption, misfeasance or malfeasance in office.

Judges do not *abuse their public offices* by conduct unconnected with their official duties which fails to meet the approval of *everyone*. Even the manner of performance of their judicial duties does not always meet universal approval, and yet is certainly not grounds for removal. Here, there was disagreement amongst the very judges before whom appellant was tried as to the propriety or non-propriety of his behavior, two of the six judges present at the time of the final hearing voting to dismiss the charges.

Eighteen of appellant's colleagues on the Supreme Court bench in the second judicial district, who are in the best position to know of his work, have attested in the Court below to his "ability, character and integrity", and have, on the basis of their personal observation, characterized him as "a learned, conscientious and devoted judge" who "has performed his judicial functions with skill, experience and impartiality" (R. Vol. IV, pp. 1255a, 1259a; Exh. 4, attached thereto).

The late Justice Russell Benedict, in a paper read at the annual meeting of the New York State Bar Association on January 21, 1922, wrote about "the glorious example of Lord Coke, who forefeited the office of Chief Justice of England and spent seven months in the Tower because he protested against the aggressions of James the First which debased and corrupted the administration of the law."

The gravamen of the charges against Lord Coke was that he "showed indecent behavior before his Majesty, the Lords of Privy Council and Judges, taking exception to the King's Attorney (Bacon) in his Majesty's presence." See Catherine Drinker Bowen's recent (1957) learned biography of Coke ("The Lion and the Throne"), pp. 377-378, the author concluding:

> "Weaker charges had never been brought against a judge."

The same may be said of the charges in the proceeding below. It is the failure to accord to appellant the most fundamental rights of due process which gives this Court jurisdiction. Justice Benedict wrote of judges in the same papers (*supra*):

> "He does not cease to be a citizen by becoming a judge."

As we shall show under the several points below, the cases submitted by Appellee are not in point and are inaccurately set forth.

POINT I

Appellant had a property right in his office and the emoluments therefrom and has been deprived thereof without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

Under Point I of its brief (p. 39) appellee states that "Appellant had no constitutional right to his office." and cites *Wilson* v. *State of North Carolina*, 169 U. S. 586, *Allen* v. *Georgia*, 166 U. S. 138, and *Snowden* v. *Hughes*, 321 U. S. 1. None of these cases are in point.

Wilson v. *North Carolina, supra* (1897), involved a railroad commissioner who was *suspended* from his office by the Governor, when charges were preferred against him. In its opinion this Court wrote that:

> "Under the statute of 1891, creating the Railroad Commission and providing for the appointment, suspension and removal of the officers of said commission, the act of the Governor in suspending the plaintiff in error *was not a finality.* Before there could be any removal, the fact of suspension was to be reported to the next legislature by the Governor, and unless that body removed the officer, the effect was to reinstate him in office, and he then became entitled to the salary during the time of his suspension." (Emphasis supplied.)

Since Wilson had not been deprived of any property by reason of his *suspension*, no federal question was presented and the Supreme Court so held.

In *Allen* v. *Georgia*, 166 U. S. 138 (1897), *supra*, the appellant had been convicted of murder. His writ of error had been dismissed by the Supreme Court of the State of Georgia because at the time "he had escaped from jail and was a fugitive from justice * * *" (p. 139). He claimed that such dismissal was a denial of due process. This Court affirmed, holding that since Allen was not in custody, the question was moot and the Court would not "determine moot questions" (p. 140); that "By escaping from legal custody he has, by the laws of most, if not all, of the States, committed a distinct criminal offence; and it seems but a light punishment for such offence to hold that he has thereby abandoned his right to prosecute a writ of error, sued out to review his conviction." (p. 141); that he was not in custody; and that "To justify any interference upon our part, it is necessary to show that the course pursued has deprived, or will deprive the plaintiff in error of his life, liberty or property without due process of law" (p. 140).

The *Allen* case is cited as authority for the statement in appellee's brief (p. 39) that "Appellant had no constitutional right to his office." There seems to be no relationship between the *Allen* case and this statement. In addition, appellee's brief (bottom of p. 41 and top of p. 42) puports to quote from that case, even though the quotation set forth does not appear anywhere in the *Allen* opinion.

Snowden v. *Hughes*, 321 U. S. 1 (1943), *supra*, is likewise distinguishable. There the petitioner sued three members of the State Primary Canvassing Board of Illinois for damages for infringement of his civil rights because they had deprived him of his right *to run* for political office. He did not *hold* political office, but only *desired to be a candidate*. Since he had never been elected to office, the District Court dismissed the complaint on the ground that there had been no deprivation of property rights, and in addition because the claimed failure of the State officers to perform their duties "was not state action". As to this last con-

tention, the present rule seems to be otherwise. *Wright* v. *State of Georgia*, 83 Sup. Ct. 1240.

In addition, the principle enunciated in both the *Wilson* v. *North Carolina* and *Snowden* v. *Hughes* cases, *supra*, has recently been rejected by the majority of this Court in *Baker* v. *Carr*, 369 U. S. 186.

The cases cited in the Jurisdictional Statement (p. 15), *Torcaso* v. *Watkins*, 367 U. S. 488, *Slochower* v. *Board of Education*, 350 U. S. 551, and *Wieman* v. *Updegraff*, 344 U. S. 183, are authority for the principle that public office and its emoluments, are entitled to the protection of due process. The highest court of New York has held that a driving license "is of tremendous value to the individual and may not be taken away except by due process." *Matter of Wignall* v. *Fletcher*, 303 N. Y. 435, 441; *Hecht* v. *Monaghan*, 307 N. Y. 461. If a license to drive an automobile is property which enjoys the protection of due process, how much more so is a term of office as a Supreme Court Justice which still has almost eight years to go, and from which appellant would have derived a total salary of approximately $276,000.

Appellee's Point I is without merit.

POINT II

Article VI, Section 9a (now Section 22) of the New York State Constitution violates the due process requirements of the Fourteenth Amendment on its face and as applied to this appellant.

Under its Point II, appellee contends that the procedure outlined in the instant section of the New York State Constitution "is due process of law and appellant has had it." In support of this statement, appellee cites two cases, *Randall* v. *Brigham*, 7 Wall. 523, and *Ex Parte Wall*, 107 U. S.

265 (1882) (p. 43, Appellee's Brief). Aside from the fact that the quotation from *Ex Parte Wall*, 107 U. S. 265, is erroneously set forth at pages 43-44 of appellee's brief, through the omission therefrom of part of the first paragraph as well as two paragraphs between the first and second, its principle can no longer be deemed controlling under modern day concepts of what constitutes due process.

In addition, neither of the two cases is in point. Both of them involved disciplinary proceedings against attorneys, and it is now firmly established that attorneys in such proceedings, as well as applicants for admission to the bar, are entitled to the protection of due process. *Matter of Cohen*, 9 A. D. 2d 436, aff'd 7 N. Y. 2d 488, aff'd 366 U. S. 117; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Matter of Willner*, 83 Sup. Ct. 1175. That being so, then surely the fixed term of office of a Justice of the Supreme Court, with its emoluments, is also entitled to equal protection.

The record in this case irrefutably shows that the Court on the Judiciary acted as the investigating body; then appointed and directed its designated counsel to prefer and prosecute the charges, which was done; and thereafter tried the charges which it had determined should be brought and which it directed its designated counsel to prefer. The record shows the following.

On August 15, 1962, the Court on the Judiciary* took the following steps with respect to the charges brought against appellant:

1. It passed "preliminarily on the sufficiency of the facts brought to its attention for the purpose of determining

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* We assume for the purpose of this argument only, that the Court was properly composed and organized on Aug. 15, 1962. We have already shown that it was not (pp. 24-26 of Jurisdictional Statement).

whether cause exists for the preferral of charges" (p. 43, Appellee's Brief).

See also: (a.) Statement of Charges, Appendix G, annexed to Jurisdictional Statement, p. 52, where it is stated that "the Court on the Judiciary has * * * determined preliminarily that sufficient cause exists for the preferral of charges * * *."

(b.) Paragraph numbered (6) of letter of Chief Judge Desmond to certain State officials wherein it is stated that "the Court on the Judiciary * * * has determined preliminarily that sufficient cause exists for the preferral of charges." (R.—motion to vacate, letter annexed).

(c.) Press release of Court on the Judiciary (annexed to same motion to vacate) wherein it is stated that "Chief Judge Desmond convened the Court on August 15, 1962, and *the six-judge body determined preliminarily that sufficient facts were disclosed as to the conduct of Justice Friedman for the preferral of charges for removal from office.*" (Emphasis supplied.)

(d.) Page 46 of Appellee's Brief (top of page) where it is stated *that the power in a court on the judiciary to consider charges of removal carries with it an "implied power" to conduct a preliminary inquisition as to whether such charges should be made*, and that such "power to determine preliminarily whether there is a *basis* for a charge being preferred is for the protection of the person involved and not for the purpose of prejudging him." (Emphasis supplied).

(e.) Page 58 of appellee's brief where it is stated: "And four here decide that there was a *basis* for charges being preferred against appellant." (Emphasis supplied.)

2. It then designated counsel to prefer the charges, which they did.

The jurisdictional statement (pp. 30-31) quotes from the affidavit of John R. Davison dated July 11,

> 1963, in which he states that "* * * deponent and Mr. Brennan were the parties *designated by the court on the Judiciary to prefer the charges* * * *" (Emphasis supplied.)

3. The Court also made an order designating the same counsel who had already been appointed to prefer the charges, to prosecute them (see order designating counsel attached to same motion to vacate).

The Court on the Judiciary violated due process when it thereafter tried the very charges which it determined should be brought and which it directed its designated counsel to prefer and prosecute. *Matter of Murchison*, 349 U. S. 133, already cited in our Jurisdictional Statement (pp. 16, 21) is directly in point and there is no escape from the rule therein laid down.

Contrary to the statement in appellee's brief (p. 50), no attack on the personal integrity of the members of the Court on the Judiciary is intended or made through the submission to this court of the citation of *The Queen* v. *The London County Council*, 1 Q. B. 190, (p. 17, jurisdictional statement). Appellant does say that the court below erred and violated the principles of due process, partially by reason of the unconstitutional features of the state constitutional section under which it presumed to act, and which imposed upon the court the duty of investigation, the preferral of charges, the prosecution, and the ultimate final proceedure of trial and determination.

While, contrary to what happened in *The Queen* v. *The London County Council, supra,* designated counsel here are not paid for their services by the court below but by the State, their right to any compensation depends in the first instance upon the institution of a proceeding, and in the second instance upon being designated by the court to prosecute the charges which they made. The amount of

their compensation is, under the law, fixed by the Presiding Judge. (See Jurisdictional Statement, p. 15)

It is not the mere assignment of counsel which is here involved. It was the Court's preliminary investigation and direction to said counsel to prefer and prosecute the charges which were later to be tried before said Court, which here violated due process.

In Schlesinger Appeal, 404 Pa. 584, and *Amos Treat & Co.* v. *S. E. C.*, 306 F. 2d 260, cited in the Jurisdictional Statement (pp. 18-19), leave no doubt that the requirements of due process were violated in the instant proceeding.

Appellee attempts to distinguish the *Amos Treat* case, *supra* (p. 51, Appellee's Brief) by stating that the Court's decision in that case was based upon a violation of an exclusionary sentence contained in 5 U. S. C., section 1004c. That is not so. The opinion in the *Amos Treat* case distinctly shows that the Court's decision was based "solely on due process grounds", 306 F. 2d at page 267, in " • • • that the investigative as well as the prosecuting arm of the agency must be kept separate from the decisional function."

The record does not support the statements in appellee's brief (pp. 6-7) that the Court on the Judiciary "thrice decided" "as a matter of fact" that it did not act as preferrer, prosecutor and trier of the charges. The Court on the Judiciary *never* decided this proposition as a matter of fact. There was no factual question involved at all. The issue presented only a question of law, and as such, it makes no difference whether the court erred once, or three times. *Baldwin* v. *Travelmen's Ass'n*, 283 U. S. 522; *Vander* v. *Casperson*, 12 N. Y. 2d 56; *O'Donoghue* v. *Boise*, 159 N. Y. 87. Strange as it may seem, not a single word of explanation by way of opinion or memorandum came from the Court on the Judiciary on any of the three occasions when it rendered its decisions. Appellee's brief (pp. 6-7)

makes its unfounded assertions upon mere inference and nothing more.

Appellee asserts (pp. 45, 46, 47, appellee's brief) that the Court on the Judiciary on August 15, 1962, only determined preliminarily that the complaint *on its face* stated facts sufficient to constitute a cause for the preferral of charges. The record shows otherwise, as has already been illustrated (pp. 11-12 this brief). If the Court only passed on the sufficiency of the complaint on its face, it would be deciding a question of law. But when it made an inquiry into the *facts* and determined on those facts that there was sufficient basis to prefer charges, and then appointed counsel and directed them to prefer and prosecute the charges, it was not deciding only a question of law. Rule V, adopted by the Court, only authorized it to determine whether the complaint *on its face* was sufficient. But the Court went beyond the authority of its own rule in inquiring into and then making the initial preliminary determination *on the facts.*

Matter of Richardson, 247 N. Y. 401, 413, cited by appellee at page 46 of its brief, is not authority for the statement there made, but does hold, as set forth in the Jurisdictional Statement (p. 21), that

> "* * * A preliminary investigation * * * is not a hearing by a judge. It is a search by an inquisitor."

Nor is *Matter of Judicial Inquiry*, 6 A. D. 2d 723 (p. 48, Appellee's Brief) authority for the statement that "the Appellate Division rejected the argument that the Justice conducting the Judicial Inquiry would be in such a case both accuser and Judge." The Justice in charge of the Judicial Inquiry merely heard *ex parte evidence and reported that evidence to the Appellate Division.* He did not *try* the proceedings or make decisions on the merits. It was on that basis that the Appellate Division made its ruling.

People ex rel. Karlin v. *Culkin*, 248 N. Y. 465 (app. br., p. 46) is distinguishable on the same basis.

Appellee's brief also asserts that "The State Constitution does not mandate that [the Court on the Judiciary] prefer such charges." and that proceedings under the constitutional article "are not in the nature of impeachment or punitive" (pp. 48-49, Appellee's Brief). The State Constitution gives the Court the power to "make its own rules * * * for the investigation * * *" (Sec. 9a, (6)(c); Sec. 22, f.) For what purpose are the rules "for investigation" other than to determine if charges should be brought, and if so, to bring them as they did here by designating counsel to do so.

And as to the contention that a removal proceeding of an elected judge is not one which is "in the nature of impeachment or punitive" (pp. 48-49, appellee's brief), the authorities hold otherwise. The very same Court on the Judiciary, in the only prior proceeding brought before it, *Matter of Sobel-Leibowitz*, 8 N. Y. 2d, pages "h", "j", following page 1158, said: (July 8, 1960)

> "Removal of any public officer, especially one elected by the voters, *is an extreme penalty*" (emphasis supplied).

The word "penalty" indicates that a proceeding which results therein is in the nature of a penal proceeding. Such a removal proceeding is "an impeachment of a judicial officer", *Matter of Tighe*, 97 App. Div. 28 (N. Y.), and in view of its "quasi-penal * * * character" "should be strictly construed" and require "clear and convincing evidence." *McMillen* v. *Drehl*, 128 Ohio St. 212, 190 N. E. 567.

Sausbier v. *Wheeler*, 252 App. Div. 267 (N. Y.) holds that "the law relating to removal from office is drastic and *highly penal*, and must be given a strict construction." (Emphasis supplied.) Similarly, *People ex rel. Robin* v. *Hayes*, 82 Misc. 165, 172, affd. 163 App. Div. 725, appeal

dismissed 212 N. Y. 603, holds that impeachment "is a method of procedure in a criminal case against a high official" for the purpose of removing him from office.

In *Randall* v. *Brigham*, 74 U. S. 523 (cited by appellee at page 43 of its brief as 7 Wallace 523), which involved a civil action against a Judge arising out of a disciplinary proceeding against an attorney, this Court, referring to judges, said: "* * * if faithless, if corrupt, if dishonest, if partial, if oppressive or arbitrary, they may be called to account *by impeachment*, and removal from office * * *" (Emphasis supplied.)

Contrary to the assertion made by appellee at page 49 of its brief, the removal proceeding was an impeachment proceeding and punitive in nature.

Very few jurisdictions permit an original conviction to take place by a divided vote. (In New York City, the Court of Special Sessions may convict by a vote of 2 to 1 for misdemeanor only.) While closely divided votes are not unusual in *Appellate Courts*, they are exceedingly rare in the United States in courts of original jurisdiction. In this case, where the conviction and resulting removal of appellant was by a closely divided vote with a majority of but one, and without an opinion showing the basis for the formal findings and conclusions which were made, it illustrates graphically the wisdom of the rule of law that a court which has made a preliminary determination that charges should be preferred and has designated the persons who are to do so and who are to prosecute them, should not thereafter also try the case.

On its face, and certainly as applied to this appellant, the procedure mandated by Article VI, section 9-a, of the New York State Constitution violated the requirements of due process.

POINT III

Where clearly apparent, this Court may consider due process violations not previously raised, together with others theretofore raised and rejected by the Court below.

A.

Appellant concedes that he has never previously raised the question submitted in Point II of the Jurisdictional Statement with respect to the vagueness of the constitutional provision which authorized removal "for cause". Nevertheless, this Court, where a constitutional violation is plainly apparent, may still consider such question, *Terminiello* v. *City of Chicago*, 337 U. S. 1; *Wright* v. *State of Georgia*, 83 Sup. Ct. 1240.

"Cause", as construed by the latest New York State Court of Appeals case on this subject, *Matter of Droege*, 197 N. Y. 44, 51, (a much later case than Peo-ex rel. Munday, 72 N. Y. 445, cited by Appellee, (p. 53 of brief)) means whatever a court sitting on a particular occasion construes it to mean. A state constitutional provision, which prescribes such a drastic penalty as removal from high judicial office, for such a vague and indefinite reason as "cause", lacking as it does any standards to define the term, on its face violates the Federal Constitution. If, as this Court has held, a conviction for a breach of the peace "under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process", *Wright* v. *State of Georgia*, *supra*, how much more so is exaction of such a severe penalty as removal from high judicial office, for acts described in the removal section only as "cause".

Certainly, such a vague reason as "cause", "prevents judicial review" by failing to provide "the courts with some measure against which to judge the official action

that has been challenged." *Arizona* v. *California*, 83 Sup. Ct. 1468.

Cramp v. *Board of Public Instruction of Orange County*, 368 U. S. 278, and the cases cited therein, (cited in Jurisdictional statement, p. 23) is in point, even though appellee lightly casts its principle aside with the statement that it "has nothing to do with this case" (appellee's brief p. 53).

The instant section of the New York State Constitution violates on its face, due process for vagueness.

B.

For the first time since the proceedings were originally instituted against appellant before the Court on the Judiciary, it now appears from appellee's brief (p. 56) that there was a further violation of the principles of due process in that the Court on the Judiciary, in making its preliminary determination, *considered evidence which never later became a part of the record.* It is there stated that the Court on the Judiciary on August 15, 1962

> " * * * determined preliminarily that sufficient facts as to the conduct of Hon. Louis L. Friedman, Justice of the Supreme Court, Second Judicial District, were disclosed in the report of Mr. Justice Bernard S. Meyer in the proceeding 'In the matter of M. Malcolm Friedman, Attorney' for the preferral, by counsel designated to conduct the proceedings, of charges for Louis L. Friedman's removal from office for abuse thereof, * * * ".

Although *parts* of the evidence taken before Mr. Justice Meyer were later specifically described through stipulation and became part of the record herein, *no part of that Justice's report* was included in that record. The consideration and knowledge, nevertheless, by the Court on the Judiciary of said report, which is not a part of the record, manifestly violated due process. *Matter of Willner*, 83 Sup. Ct. 1175.

It thus appears, contrary to the assertion in appellee's brief (p. 46), that the members of the Court on the Judiciary *did* acquire "extraneous knowledge". To the extent that they acquired and used this "extraneous knowledge", not a part of the record, we do not concede "the open-mindedness of the members of the Court", as claimed by appellee (brief, p. 46).

Appellant has never heretofore raised this question because the record does not show, and he was not aware of what took place at the ex parte meeting held on August 15, 1962. Appellee's brief has now, for the first time, conceded that this extraneous evidence was considered by the Court on the Judiciary.

POINT IV

It is a violation of federal due process to deprive a person of property through action by a body which is required to be a court, but which has not been duly composed and organized as such

Under its Point V (p. 54, Appellee's Brief), appellee asserts that the manner in which state citizens are entitled to state offices or removed therefrom is not within the reach of federal due process, and that this Court has so decided. In support of that statement, appellee cites *Snowden* v. *Hughes, supra*, 321 U. S. 1; *Cave* v. *Newell, supra*, 246 U. S. 650; *Taylor & Marshall* v. *Beckham, supra*, 178 U. S. 548; *Wilson* v. *State of North Carolina, supra*, 169 U. S. 586; *Allen* v. *Georgia, Supra*, 166 U. S. 138.

None of the cases cited so hold. As we have previously pointed out, *Snowden* v. *Hughes, supra*, was a case which involved the question of whether state officers violated the principle of due process in ruling that appellant had no right to *run* for an office.

Wilson v. *State of North Carolina, supra,* involved only the principle that there was no deprivation of property because appellant there had only been *suspended* from office and until a final determination as to his removal was made, could not have lost any property rights.

Allen v. *Georgia, supra,* had nothing whatever to do with the question of State officers or removal proceedings, but involved the question of an escaped prisoner whose appeal was rendered "moot" by reason of that escape.

Cave v. *Newell, supra,* was dismissed for want of jurisdiction and did not involve the questions here presented.

Taylor & Marshall v. *Beckham, supra,* cited in the *Cave* v. *Newell* case, involved a contest over an election and the power of the state to prescribe the qualifications of its officers and the manner of their election. The statement at page 576 of the opinion (decided in 1899), "that public office is not property" has been overruled by the recent cases already cited herein. *Torcaso* v. *Watkins,* 367 U. S. 488, 495, 496; *Slochower* v. *Board of Education,* 350 U. S. 551, 555-557; *Wieman* v. *Updegraff,* 344 U. S. 183, 191-192, *supra,* p. 10.

The argument made by appellee under Point V of its brief (pp. 54, *et seq.*), that the Court on the Judiciary was duly composed and constituted, is not borne out by the conceded facts. The all-important session at which only four members were present, with only one instead of two from the Court of Appeals, was held on August 15, 1962 when the Court first attempted to organize. If those present could not legally organize as a court, then there was lack of judicial authority which "relates to basic constitutional protections designed in part for the benefit of litigants," *Glidden Company* v. *Zdanok,* 370 U. S. 530, 536, re-hearing denied, 371 U. S. 854.

The Appellate Division, Third Department, in the instant case has said, "Moreover, due process of law requires

that the court or other tribunal is competent and duly constituted" (Appendix D, Jurisdictional Statement, p. 41).

Important initial steps were taken on that date of August 15, 1962. Charges were voted, counsel was designated to prefer them and to prosecute them, a Clerk to the Court was appointed, rules were adopted, and other important procedures took place (see Clerk's Minutes under date of Aug. 15th attached to R., motion to vacate).

Appellee concedes (p. 56, Appellee's Brief) that two of the Judges (one of them from the Court of Appeals) were not present on August 15, 1962 and that the preliminary determinations "were made upon the vote, therefore, of all four of the members present." Appellee argues, however, that the Constitution "does not require that all members of the court on the judiciary have to be present when any action is taken by the Court." The trouble with that argument is that the State Constitution provides that unless all six members are present, including two judges from the Court of Appeals (with substitution for either or both in the event of absence), there is no legally constituted court which has the power to act. The four members present, no matter how good their intentions, had no power themselves to decide at that time, that since only four were present, four should be a quorum, and adopt an unauthorized rule to that effect (Rule 1, adopted on Aug. 15, 1962, quoted on p. 57, Appellee's Brief). And the failure *originally* legally to compose, organize or constitute a court is not cured by the presence *several months later* of all six members, after essential proceedings had already taken place.

At page 58, appellee argues that the rule adopted by the four members who were present, that "four members shall constitute a quorum" was a proper rule, because only the concurrence of four is required to enter an order of removal. Nothing could be more illogical. In the first place, the composition of the court and its quorum, if any, is governed by the provisions of the State Constitution,

wherein it was created, and nothing in that constitution authorizes either action by less than the entire membership of six, or the adoption of a rule for such purpose. In the second place, "quorum" and "concurrence" are kept very much separate and apart in the New York State Constitution. In the Court of Appeals, five Judges constitute a quorum, with only the concurrence of four necessary for a decision, while in the Appellate Divisions of the State, four are a quorum with three required for decision. While it is true that the concurrence of only four members of the Court on the Judiciary is required in order to enter a removal order, the presence of all six is necessary before that Court is empowered to act in the first place. The rule could not change the constitutional requirement.

The only authority set forth in the Constitution to make rules was "concerning the procedure to be adopted for the investigation and trial of a judicial officer * * *." And even if the rule was within the power of the four who were present, nothing therein even attempted to deviate from the constitutional requirement that *two* and not *one* Judge from the Court of Appeals (with provision for substitution in the event of absence) must be present to compose and organize a court and enable it to act.

If four could legally be a quorum under the rule adopted, then only the four Appellate Division Justices could conduct the proceedings from beginning to end without the presence at any time of either Judge from the Court of Appeals; but that is not what the constitution either provides or intended. It is conceded here that Judge Dye, senior associate Judge of the Court of Appeals, was absent from the session of August 15, 1962, and that no substitution was made as the Constitution requires (p. 56, Appellee's Brief).

While jurisdiction may not be waived, even with knowledge that two of the Judges were absent, the record shows that the publicized action of the court of its session of

August 15, 1962 (an ex parte session not attended by appellant or his representative) certified *that all six judges were present.* Three orders were signed on that day which so indicated. (See 3 orders dated Aug. 15, 1962 attached as exhibits to R., motion to vacate).

In addition, the Court later issued a release (see release attached to R., same motion to vacate), stating that the determination on August 15, 1962 was made by "the six-judge body." The only place where the absence of the two Judges from the August 15th session was noted was in the Clerk's Minutes, which were never made available to appellant until after the order of removal had been entered.

Perhaps, as appellee states (p. 58, Appellee's Brief), "it was no secret that Judge Dye was at the American Bar Association meeting in San Francisco and Justice Rabin was in Europe." But appellant certainly had no reason to keep track of each and every one of the hundreds of judges and justices in New York State and to know where each one was at a given time. Appellant's first knowledge that two judges were absent was after the order of removal was handed down and the clerk's minutes were made available to him.

On page 59 of appellee's brief it is stated it is a matter of state law whether the Court on the Judiciary was duly composed and constituted, citing *Kovacs* v. *Cooper*, 336 U. S. 77, 84-85; *Lovell* v. *Griffin*, 303 U. S. 444; and *Winters* v. *New York*, 333 U. S. 507, 514. None of these cases so hold. *Kovacs* v. *Cooper, supra*, involved the question of whether an ordinance of the State of New Jersey barring the use of sound trucks violated due process requirements because it was vague, indefinite and without standards, and has absolutely no relation to the question of composition of a court. *Lovell* v. *Griffin, supra*, similarly involved a question of a vague and indefinite ordinance of a city in the State of Georgia, and the Court there held that the

ordinance was void on its face. The third case cited, *Winters* v. *New York*, also involved the question of a New York City ordinance which made it a misdemeanor to have in one's possession with intent to sell certain obscene literature, and the Court there held, in reversing a conviction under that ordinance, that it was vague and indefinite. None of these cases had anything to do with the point made by appellee at page 59, previously referred to.

POINT V

Appellant was tried on two charges which were never served on either him or the State officials entitled to notice thereunder.

Under its Point VI (p. 60, Appellee's Brief), it is disputed that appellant was tried on two additional charges which were not part of the Statement of Charges served on him. The third charge in the Statement of charges reads that appellant abused his public office as a Justice of the Supreme Court "(3) by violating and failing to observe the concept, spirit and letter of the canons of judicial ethics, and by causing M. Malcolm Friedman to violate and to fail to observe the canons of professional ethics." *There are no "two specifications" of practicing law and income tax violation thereunder as is claimed by appellee* (Appellee's brief p. 33). Even at this late date it is not clear what the charge involved, in view of the failure of the court below to render an opinion, or to find more on this charge than that appellant "by his actions as to the Shevack claim violated and failed to observe the concept, spirit and letter of the canons of judicial ethics". (Appendix A, jurisdictional statement, p. 34) Which "actions as to the Shevack claim" violated which of the 36 canons of judicial ethics remains a mystery to this day. Nor is there any showing how any of the findings con-

stituted an "abuse" of appellant's office of Justice of the Supreme Court.

Neither appellant nor the State officials entitled to notice of the "nature of the charges" could possibly know by reading this third charge that it included a charge of practicing law in the *Shevack* matter and another charge of income tax violation. It was only at a *later* time, after the answer had been served, upon insistence by appellee that evidence with respect to two such charges be included as part of the stipulated record, that appellant's counsel on December 10, 1962 sought a ruling from the Court on the Judiciary as to whether such evidence was admissible in the absence of a charge with respect thereto. Over appellant's objection, the Court ruled that it would receive the evidence, and appellant then, reasserting the objection made, *stipulated that if the witnesses were called they would testify as set forth in the record.* Appellant did not stipulate the evidence with respect to the *Shevack* case and the income tax charge, as part of the record.

The stipulation, so far as pertinent, reads (R. vol. I, p. 7a):

1. That if the witnesses whose names appear in this record were personally called to testify in this proceeding, they would each testify as set forth herein.

2. That this stipulation is entered into by the respondent without in any way waiving respondent's objections heretofore made and herein reasserted to:

> (a) The introduction of any evidence with respect to any and all matters involving the settlement of a claim for injuries sustained by one Arthur Shevack or anything relating thereto;
>
> (b) The inclusion of any matters involving the alleged failure to comply with the Income Tax Laws:
>
> (c) The procedures herein on the grounds asserted by respondent that such procedures are viola-

tive of the mandates, prohibitions and protection of the due process clause of the Fourteenth Amendment to the United States Constitution, raised in paragraph "Sixth" of respondent's answer.

If appellee intended to make additional charges against appellant, the proper thing to do, in accordance with due process, was to amend the statement of charges, serve the amended charges on both appellant and the State Officials entitled thereto, and have issue joined in the regular way, instead of just submitting evidence with respect thereto. They cannot shrug off their responsibility to charge that which they attempt to prove, by a contention that appellant's counsel was orally told that this kind of evidence was going to be submitted, in the face of the failure to make any charges with respect thereto. That is not due process. Appellant and the State Officials were entitled to be told *in advance*, what the charges were.

In any event, assuming even the fact that appellant was aware of these charges, there is no dispute that giving notice to the State Officials that appellant was being charged with a violation of the Canons of Judicial Ethics and causing his brother to violate the Canons of Professional Ethics, did not give *them* the mandated notice that included therein was a charge of income tax violation and a further charge of practicing law. Notice to them of "the nature of the charges", meaning *all* the charges, was an absolute 'condition precedent' under the State constitution to the commencement of the trial.

No finding was ever made as to the income tax charge, or that appellant caused his brother to violate the canons of ethics.

Due Process was violated through failure to give notice of *all* of the charges to be tried.

CONCLUSION

Thus far, appellee has challenged every attempt which has been made to review either the merits of the proceeding before the Court on the Judiciary, or even the questions raised as to the jurisdiction of that Court to proceed in the first instance. In the first decision on such a challenge (Appendix D, Jurisdictional Statement), the Appellate Division held that by reason of the hierarchical scheme of courts in New York State, and for other reasons set forth in the opinion, it had no jurisdiction to consider the questions raised. In response to appellant's motion for leave to appeal to the Court of Appeals from the dismissal by the Appellate Division, appellee has similarly challenged that Court's jurisdiction to grant relief, and has refused to discuss either the merits of the controversy or the jurisdictional questions which have been raised. In the Article 78 proceeding in the Supreme Court of New York County, (brought under New York State Civil Practice Act) where a mandamus was sought against the Comptroller of the City of New York for the payment of salary, thus collaterally attacking the order made by the Court on the Judiciary on the ground of lack of jurisdiction, appellee has similarly taken the position that no New York State court can in any way interfere with the order entered. Appellee has contended in every New York State court that appellant's sole remedy is by way of *this appeal to this Court. Here, however,* appellee argues that even *this* Court should not consider any of the questions raised and that despite the obvious departures from due process detailed in appellant's Jurisdictional Statement, no other court, either state or federal, may question what the Court on the Judiciary has done, or even whether it had jurisdiction to proceed.

We have long since departed from the principle that "The King can do no wrong." The rule of might must not be allowed to supplant the rule of right. Certainly somewhere, some place, in some court and through some

procedure, appellant is entitled to an adjudication of whether he was tried by a duly constituted court, under accepted principles of due process, and in the mode and manner required by the Constitution. Appellant's entire future and livelihood is at stake, and his property as well as a good reputation earned by him through hard work and diligent effort over the past quarter of a century in public life as an Assemblyman, a Senator of the State of New York, a Justice of the Supreme Court elected by more than a million voters, a member of the Board of Trustees of the Brooklyn Law School, a member of the Tweed Commission for the Reorganization of the New York State Courts headed by the eminent Harrison C. Tweed, and other such public offices, should not be taken from him on such flimsy charges, not involving corruption, misfeasance, malfeasance, or even connection with his judicial duties, by a divided bare majority vote, and without at least an opportunity for review by some other body.

"* * * it would be shortsighted not to recognize that times like these are bound to produce temptations and pressures to depart from or temporize with traditional constitutional precepts or even to short cut the processes of change which the constitution, establishes. It is the special responsibilty of lawyers, whether on or off the bench, to see to it that such things do not happen." (From address delivered by Mr. Justice John M. Harlan at dedication of additions to American Bar Center, American Bar Association Meeting at Chicago, August 1963; Editorial Page, New York Law Journal, Aug. 27, 1963).

"A remedy there must be." (Judge Fuld, in *Peo. ex rel. Harrison* v. *Jackson*, 298 N. Y. 219, 227.

This court said in *Mapp* v. *Ohio*, 367 U. S. 643, 659. "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

The motion to dismiss or to affirm should be denied, and this appeal should be heard and decided on its merits.

Respectfully submitted,

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